(24,635)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 408.

JOHN G. McINTYRE, PLAINTIFF IN ERROR,

vs.

FREDERICK W. KAVANAUGH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 5, 1916.

a Court of Appeals, State of New York.

FREDERICK W. KAVANAUGH, Plaintiff-Respondent,
against
THOMAS A. McINTYRE, JOHN G. McINTYRE, EDWARD T. WHITE, and Thomas A. McIntyre, Jr., Defendants; John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, Appellants.

Case on Appeal.

Patton & Patton, Attorneys for John G. McIntyre and Thomas A. McIntyre, Jr., Appellants.
John J. O'Connell, Attorney for Edward T. White, Appellant.
Myer Nussbaum, Attorney for Frederick W. Kavanaugh, Respondent.

* * * * * * *

1-4 *Notice of Appeal of John G. McIntyre and Thomas A. McIntyre, Jr.*

Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. McINTYRE, JOHN G. McINTYRE, EDWARD T. WHITE, and THOMAS A. McINTYRE, JR., Defendants.

SIR: Please take notice that the defendants John G. McIntyre and Thomas A. McIntyre, Jr., appeal to the Appellate Division of the Supreme Court of the State of New York, Third Department, from the judgment of this Court entered herein in the office of the Clerk of the County of Saratoga on or about the eighteenth day of December, 1911, whereby it was adjudged that the said plaintiff recover of the defendants John G. McIntyre, Edward T. White and Thomas A. McIntyre, Jr., the sum of Thirty thousand five hundred and eighty 18/100 Dollars, and from each and every part thereof and the whole thereof.

Dated, New York, December 29th, 1911.

PATTON & PATTON,
Attorneys for Defendants John G. McIntyre & Thomas A. McIntyre, Jr.

40 Wall Street, Borough of Manhattan, City of New York.

5 & 6 To the Clerk of the County of Saratoga.

Myer Nussbaum, Esq., plaintiff's attorney.

* * * * * * *

7–13 *Summons.*

Supreme Court, Saratoga County.

Trial Desired in Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE, THOMAS A. MCINTYRE, JR., and GEORGE C. RYAN, Defendants.

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, May 15th, 1908.

MYER NUSSBAUM,
Plaintiff's Attorney.

Office and Post Office Address, No. 261 Broadway, Borough of Manhattan, New York City.

* * * * * * *

14 *Amended Complaint.*

Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE, THOMAS A. MCINTYRE, JR., and GEORGE C. RYAN, Defendants.

The plaintiff for his amended complaint herein alleges:

First. That he is a resident of the Town of Waterford, Saratoga County, New York.

Second. Upon information and belief that the defendants John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan, and said Thomas A. McIntyre, since deceased, were, at the times hereinafter mentioned, co-partners in business under the firm name of T. A. McIntyre & Co.

Third. That on the 5th day of February, 1908 and prior thereto, the said plaintiff was the owner of the following stocks and scrip:

100 shares of Missouri Pacific, represented by 4 certificates for 25 shares each, A.41015; A.38741; A.28770; A.35974;

15 100 Erie 1st, represented by certificate M.7696;

100 shares Missouri Kansas & Texas, common, represented by certificates numbers A.10581; A.10600;

200 Cast Iron Pipe, represented by certificates Nos. 4665, and 7504;

250 Mo. P. scrip, represented in certificates A.41254; A.41252; for $200 each;

and which said stocks and scrip were in the possession of the firm of A. O. Brown & Co., and that there was due upon said stocks and scrip on said latter date, the sum of $3,853.32, and that the plaintiff on that day and prior thereto was entitled to the possession of said stocks and scrip upon the payment of said sum of $3,853.32, and that on said latter date the plaintiff instructed said defendants John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan, and said Thomas A. McIntyre, since deceased, under the firm name of T. A. McIntyre & Co., to take over said stocks and scrip from said firm of A. O. Brown & Co. and to advance thereon $3,853.32, and that on said latter date the said stocks and scrip were turned over and delivered by said firm of A. O. Brown & Co., to said defendants John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan, together with said Thomas A. McIntyre, since deceased, as such co-partners as aforesaid, who advanced thereon the sum of $3,853.32.

Fourth. Upon information and belief, that subsequent to the sale and disposition of said stocks and scrip by said defendants John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan (and said Thomas A. McIntyre, since de-
16 ceased) as hereinafter alleged, and on or about the 27th day of April, 1908, an involuntary petition in bankruptcy was filed against said defendants John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan (and said Thomas A. McIntyre, since deceased) as such co-partners, in the District Court of the United States for the Southern District of New York, and that subsequent to the filing of said petition Charles C. Burlingham and Arthur R. Peck were duly appointed receivers of said firm of T. A. McIntyre & Co., who duly qualified, and that subsequent thereto they were discharged as such receivers and said Charles C. Burlingham, Arthur R. Peck and Albert R. Bonynge were duly appointed trustees of said firm of T. A. McIntyre & Co., and duly qualified and are now acting as such.

Fifth. That on the 28th day of April, 1908, the said plaintiff, through his attorney, tendered to said receivers the sum of $3,920 in gold coin, being the balance due and interest upon said stocks and scrip and asked and demanded the delivery of same which was refused, and that on said latter date, the said sum, in accordance with provisions of said tender, so made as aforesaid, was deposited in the Merchants Exchange National Bank, to the credit of said Charles C. Burlingham and Arthur R. Peck, receivers of T. A. McIntyre & Co., aforesaid, with the condition that said sum be turned over to said receivers upon delivery of the securities described in said tender so made as aforesaid.

Sixth. That the defendants John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan, together with said Thomas A. McIntyre, since deceased, as such co-partners as afore-

said, never delivered to the plaintiff the stocks and scrip aforesaid or any part thereof.

17 Seventh. That the defendants John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan, together with said Thomas A. McIntyre, since deceased, under the firm name of T. A. McIntyre & Co., as aforesaid, without right, order or authority, wrongfully, willfully and maliciously disposed of said property and scrip and injured the property of the plaintiff, and have, without the knowledge or consent of the plaintiff, converted the same to their own use.

Eighth. That the defendants John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan, and said defendant Thomas A. McIntyre, since deceased, have refused, failed and neglected to deliver such certificates of stocks and scrip to the plaintiff, nor to account to plaintiff, nor to pay to the plaintiff the value of said certificates of stock and scrip, or the proceeds derived by them for their disposition of the same.

Ninth. That by reason of the acts of said defendants John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan (and said Thomas A. McIntyre, since deceased) and by their wrongdoing and conversion of said certificates of stock and scrip, and the proceeds thereof, plaintiff has been damaged in the sum of Thirty thousand dollars.

Wherefore, plaintiff demands judgment against the said defendants as such co-partners as aforesaid for the sum of Thirty thousand dollars, with interest thereon from the 5th day of February, 1908, together with the costs and disbursements of this action.

MYER NUSSBAUM,
Attorney for Plaintiff.

261 Broadway, New York City, N. Y.

18 STATE OF NEW YORK,
County of Saratoga, ss:

Frederick W. Kavanaugh, being duly sworn, deposes and says that he is the plaintiff in the within action; that he has read the foregoing amended complaint and knows the contests thereof, that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

FREDERICK W. KAVANAUGH.

Sworn to before me this 13th day of June, 1911.

[SEAL.] CHAS. R. BUTTON,
Notary Public.

19 *Answer of John G. McIntyre to Amended Complaint.*

Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. McINTYRE, JOHN G. McINTYRE, EDWARD T. WHITE, THOMAS A. McINTYRE, JR., and GEORGE C. RYAN, Defendants.

The Separate Answer of John G. McIntyre, One of the Defendants Above Named, to the Amended Complaint of the Above-named Plaintiff.

And now comes the defendant John G. McIntyre by Patton and Patton, his attorneys, and answering -he amended complaint of the above named plaintiff answers:

I. Admits the allegations of paragraph- numbered First and Second of said amended complaint.

II. Admits that on or about February the 5th, 1908, the defendants, as brokers were carrying for the plaintiff, 100 shares of Missouri Pacific, 100 shares of Erie first, 100 shares Missouri Kansas & Texas common, 200 shares Cast Iron Pipe, and 250 shares Missouri Pacific scrip on which the defendants advanced for the plaintiff as such brokers the sum of about $3,853.32. Denies that this
20 defendant received any instructions from the plaintiff in reference to said stock or scrip. Denies he has any knowledge or information sufficient to form a belief as to any of the allegations in paragraph Third of said amended complaint except as above admitted or denied.

III. Admits that on or about the 25th day of April, 1908, an involuntary petition in bankruptcy was filed against said defendants as such co-partners in the District Court of the United States for the Southern District of New York, and that subsequent to the filing of said petition Charles C. Burlingham and Arthur R. Peck were appointed receivers of said firm of T. A. McIntyre & Co., who duly qualified as such and that subsequent thereto they were discharged as such receivers and Charles C. Burlingham, Arthur R. Peck and Albert R. Bonynge were duly appointed Trustees in bankruptcy of said firm of T. A. McIntyre & Co. Denies that he sold or disposed of said stock or scrip; denies he has any knowledge or information sufficient to form a belief as to each and every other allegation of said paragraph Fourth of said amended complaint.

IV. Denies he has any knowledge or information sufficient to form a belief of any of the allegations contained in paragraph numbered Fifth of said amended complaint.

V. Denies that this defendant unlawfully or willfully or maliciously disposed of said property or scrip mentioned in said amended complaint or injured the property of the plaintiff, or that this defendant converted the same to his use. That as to all the

allegations of said paragraph Seventh in reference to his co-
21 partners this defendant denies he has any knowledge or information sufficient to form a belief thereof.

VI. Admits that he has not delivered the said certificates of stock and scrip mentioned in said amended complaint to the plaintiff nor paid to the plaintiff the value thereof, but alleges that no demand for the delivery of any such certificates *or* stock or scrip or of the value thereof was made on this defendant. As to all the other allegations of said paragraph Eighth of said amended complaint and as to the allegations in said amended complaint in reference to his co-defendants this defendant denies that he has any knowledge or information sufficient to form a belief thereof.

VII. Denies that he has been guilty of any wrongdoing or conversion of said certificates of stock or scrip as alleged in paragraph Ninth of said amended complaint and upon information and belief denies that the plaintiff has been damaged in the sum of $30,000 as claimed in said paragraph Ninth of said amended complaint.

VIII. Further answering, this defendant alleges that the defendants composing the firm of T. A. McIntyre & Co. were prior to and from the 5th day of January, 1908, and up to April 24th, 1908, engaged in business in the City of New York in the business of brokers buying and selling stocks, scrip, bonds and commodities on commission operating on the Stock, Produce and Coffee Exchanges of the City of New York, according to the rules of said Exchanges and upon other Exchanges in other cities of the United States; and upon information and belief, this defendants alleges that the transaction between the plaintiff and these defendants were had
22 in their capacity as brokers and not otherwise. And this defendant further alleges that this defendant was the floor broker of said firm and that his duties as a member of said firm were in the execution of orders for the buying and selling of stock on the floor of the Stock Exchange in said city, and that he had no personal knowledge of any of the transactions of said firm with said plaintiff. That prior to the time of the filing of a petition in bankruptcy against said firm and the appointment of a receiver for it, he had no knowledge or information that the plaintiff had had any dealings with said firm, or that said firm had had at any time any stocks or scrip belonging to said plaintiff or in which said plaintiff had any interest, or that any stocks or scrip in which the plantiff had any interest, had been sold.

Second.

For a further and separate answer and defense this defendant alleges that on or about the 25th day of April, 1908, a petition in bankruptcy was filed in the District Court of the United States for the Southern District of New York, against the firm of T. A. McIntyre & Co., composed of the defendants herein; and that thereupon such proceedings were had therein that the said firm of T. A. McIntyre & Co. and the members thereof individually including this defendant were duly adjudicated bankrupts by said Court. That thereafter schedules in bankruptcy of said firm of T. A. Mc-

Intyre & Co., and the individual schedules of this defendant were duly filed in said Court. That thereafter, as defendant is informed and believes, the plaintiff appeared in said bankruptcy proceedings and filed a claim in said bankruptcy proceedings against
23 said firm for said stock mentioned in said amended complaint and said claim was allowed for the sum of $23,142.73. That within twelve months from the date of the adjudication in bankruptcy of said firm and of this defendant, this defendant duly filed his petition for a discharge in bankruptcy in said Court and that such proceedings were thereafter had thereon, that on the 24th day of January, 1911, this defendant was duly granted a discharge in bankruptcy. A copy of said order of discharge in bankruptcy is hereto attached. That this defendant is advised and states upon information and belief that the said discharge in bankruptcy released and discharged this defendant both individually and as a member of the firm of T. A. McIntyre & Co. of whatever obligations of any kind he may have incurred to the plaintiff on account of the matters and things set forth in said amended complaint, and that the said discharge in bankruptcy is a complete bar to the plaintiff's cause of action set forth in said amended complaint against this defendant.

Wherefore, this defendant prays that the said amended complaint be dismissed, as to him with costs.

PATTON & PATTON,
Attorneys for Defendant John G. McIntyre.

Office and P. O. Address, 40 Wall Street, Borough of Manhattan, City of New York.

24 STATE OF NEW YORK,
County of New York, ss:

John G. McIntyre, being first duly sworn on oath, deposes and says that he is one of the defendants named herein and that the foregoing answer is true to his knowledge except as to the matters therein alleged to be stated upon information and belief and as to those matters be believes it to be true.

JOHN G. McINTYRE.

Subscribed and sworn to before me, this 3rd day of July, 1911.
[SEAL.] ROBT. E. J. CORCORAN,
Notary Public, Kings Co.

Certificate filed in New York Co.

District Court of the United States, Southern District of New York.

No. 10903.

Whereas, John G. McIntyre, Thomas A. McIntyre Jr., and Edward T. White in said District, have been duly adjudged bankrupts under the acts of Congress relating to bankruptcy, and appear to have conformed to all the requirements of law in that behalf, it is

therefore ordered by this Court that said John G. McIntyre, Thomas A. McIntyre Jr., and Edward T. White individually and as members of the firm of T. A. McIntyre & Co., be discharged from all debts and claims which are made provable by said acts
25-38 against their and each of their estates, and which existed on the 22nd day of May A. D. 1908, on which day they were adjudicated bankrupts, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable George C. Holt, Judge of said District Court, and the seal thereof, this 24th day of January, A. D. 1911.

GEO. C. HOLT,
District Judge.

THOMAS ALEXANDER, *Clerk.*

I, Thomas Alexander, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the above is a true copy of an order of a discharge made in the above entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereto affixed, at the City of New York, in the Southern District of New York, this 6th day of February, the year of our Lord One thousand nine hundred and eleven, and of the independence of the said United States the One hundre-th and thirty-fifth.

[SEAL OF COURT.] THOMAS ALEXANDER, *Clerk.*

39 *Findings.*

Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE, and THOMAS A. MCINTYRE, JR., Defendants.

The above cause having been tried at a Term of this Court commencing on the first Monday of October, 1911, at the Village of Ballston Spa, Saratoga County, New York, before Hon. Joseph A. Kellogg, without a jury, upon the issue of fact joined therein, and the proof and allegations of the respective parties and arguments of counsel having been heard and duly considered, I do find and decide, as matters of fact as follows:

First. That the plaintiff was, at the time of the commencement of this action, and is still a resident of the Village of Waterford, Saratoga County, New York.

Second. That the defendants John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, together with George C. Ryan and Thomas A. McIntyre, deceased, constituted, in February, 1908, a brokerage firm engaged in business as such, in the City
40 of New York, under the firm name of T. A. McIntyre & Company.

Third. That prior to the 5th day of February, 1908, one George W. Kavanaugh, a brother of the plaintiff, had a cotton account and also a stock account with the brokerage firm of A. O. Brown & Company, of the Borough of Manhattan, City of New York, and being indebted to his brother, the plaintiff, he transferred to him his interest in said stock account, prior to the 5th day of February, 1908.

Fourth. That on the 5th day of February, 1908, the plaintiff, being the owner of said stock account with said brokerage firm of A. O. Brown & Company, was indebted to such firm upon such stock account to the amount of $3,853,32, and that said firm of A. O. Brown & Company held as security therefor, the following stocks and scrip:

100 shares of Missouri Pacific,
100 shares Erie 1st,
100 shares Missouri, Kansas & Texas common,
200 shares Missouri, Kansas & Texas, preferred,
200 shares Cast Iron Pipe,
$250 Missouri Pacific Scrip,

which said stocks were listed upon the New York Stock Exchange of the value of approximately $25,000, being more than six times the amount due upon same as aforesaid.

Fifth. That on said 5th day of February, 1908, by direction of the plaintiff, said firm of T. A. McIntyre & Company, composed as aforesaid, took over this account, receiving the following certificates of stock represented by said account, from said firm of A. O. Brown & Company:

41 100 shares Missouri Pacific, represented by four certificates for 25 shares each, numbered as follows: A.41015; A.38741; A.35974 and A.28770.

100 shares Erie 1st represented by certificate M.7696.

100 shares Missouri, Kansas & Texas, common, represented by certificate O.20163.

200 shares Missouri, Kansas & Texas, preferred, represented by certificates A.10581 to A.10600, inclusive, for 10 shares each.

200 shares Cast Iron Pipe, represented by certificates Nos. 7504 and 4665, for 100 shares each.

$250 Missouri Pacific Scrip, represented by certificates A.41252 and A.41254, for two shares each, and gave in exchange certificate No. 39488 for 1 share and certificate No. 926 for ½ share, and paid the amount due said firm of A. O. Brown & Company as aforesaid, thus succeeding to their interest; they also took over said cotton account, and which was carried on the books of said firm of T. A. McIntyre & Company separately and which was shortly afterward closed out at a final profit which is still due to the plaintiff or his brother, but which does not in any way affect the stock transaction aforesaid.

Sixth. That almost immediately after taking over said stocks by certificates as aforesaid by said firm of T. A. McIntyre & Company, composed as aforesaid, and commencing on the very next day, said firm of T. A. McIntyre & Company (the above named defendants being members thereof) without any notice to the plaintiff, and with-

out his authority, knowledge and consent, or demand of any kind upon him, sold and disposed of the identical certificates of such stock and scrip so turned over to them as aforesaid, and placed the
42 avails thereof in the bank account of said firm of T. A. McIntyre & Company to the credit of said firm.

Seventh. That the various stocks aforesaid had all been disposed of prior to the 18th day of March, 1908, and that three-quarters in value thereof had been disposed of on or prior to February 14th, 1908, or within nine days after the acquisition of the possession thereof by defendant's firm as aforesaid.

Eighth. That the above named defendants, together with the other members of said firm of T. A. McIntyre & Company, in disposing of said stocks aforesaid, without notice to, or demand upon the plaintiff, and without his authority, knowledge or consent, and in depositing the proceeds and avails thereof in the bank account to the credit of said firm of T. A. McIntyre & Company, committed wilful and malicious injury to the property of the plaintiff.

Ninth. That on April 23rd, 1908, the said firm of T. A. McIntyre & Company filed a petition in bankruptcy in the United States District Court for the Southern District of New York, and were afterwards adjudicated bankrupts.

Tenth. That thereafter the plaintiff in this action proved his claim against the bankrupt estate without waiving any legal rights in this action or otherwise.

Eleventh. That the defendant Thomas A. McIntyre died subsequent to the commencement of this action.

Twelfth. That a discharge in bankruptcy was granted to the defendants John G. McIntyre, Thomas A. McIntyre, Jr., and
43 Edward T. White, and was denied as to the defendant George C. Ryan, who was not served herein, and in relation to whom this action was severed by an order of this Court dated September 27th, 1911.

Thirteenth. That the discharge in bankruptcy of said defendants John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, has been pleaded herein as a separate defense.

Fourteenth. That the highest price of the stocks and scrip turned over by said firm of A. O. Brown & Company to said firm of T. A. McIntyre & Company (the above named defendants being members thereof) and sold by them as aforesaid and after the conversion thereof and prior to the trial of this action, were reached during the months of December, 1908 to February, 1909, inclusive, and from a statement of prices submitted by agreement, the following are such highest prices:

100	Missouri, Kansas & Texas	44⅞	4,487.50
100	Missouri Pacific	78⅜	7,337.50
2½	Missouri Pacific	73⅜	183.44
200	Cast Iron Pipe	30⅞	6,175.00
100	Erie 1st Preferred	51½	5,150.00
200	Missouri, Kansas & Texas Preferred	75½	15,100.00
1	Erie Scrip	0	0.00
	Total		$38,433.44

Fifteenth. That there should be deducted from said total the amount due upon said stocks, viz., $3,853.32.

Sixteenth. The amount of damage alleged to have been suffered by the plaintiff in the amended complaint herein is the sum of $30,000.

44 I find as conclusions of law:

First. That the above named defendants, together with the other members of said firm of T. A. McIntyre & Company, in disposing of said stocks aforesaid, and misappropriating the proceeds and avails thereof, without notice to, or demand upon the plaintiff, and without his authority, knowledge or consent, committed wilful and malicious injury to the property of the plaintiff, and that under Subdivision 2, Section 17, of the Bankruptcy Law of the United States, the debt involved herein is an undischargeable debt and survives the discharge in bankruptcy of said defendants aforesaid.

Second. That the plaintiff is entitled to judgment herein against said defendants John G. McIntyre, Edward T. White and Thomas A. McIntyre, Jr., as members of the firm of T. A. McIntyre & Company, for the wilful and malicious injury to the property of the plaintiff as aforesaid, in the sum of Thirty Thousand Dollars, together with the costs of this action.

J. A. KELLOGG, *J. S. C.*

45 *Judgment.*

Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. McINTYRE, JOHN G. McINTYRE, EDWARD T. WHITE, and THOMAS A. McINTYRE, JR., Defendants.

This case having been tried at a Trial Term of this Court, held at the Village of Ballston Spa, Saratoga County, New York, on the 6th day of November, 1911, before Hon. Joseph A. Kellogg, Justice of said Court, a jury having been duly waived by oral consent of the parties in open court entered in the minutes, and the decision of said Justice having been duly made in writing and filed by which he finds that the plaintiff is entitled to judgment herein against the defendants John G. McIntyre, Edward T. White and Thomas A. McIntyre, Jr., as members of the firm of T. A. McIntyre & Company, for wilful and malicious injury to the property of the plaintiff in the sum of Thirty Thousand ($30,000) Dollars.

Now, therefore, it is adjudged, pursuant to said decision, on motion of Myer Nussbaum, Esq., attorney for the plaintiff Fred-
46 & 47 erick W. Kavanaugh that said plaintiff Frederick W. Kavanaugh recover from and against the said defendants John G. McIntyre, Edward T. White and Thomas A. McIntyre, Jr., for the wilful and malicious injury to the property of the plaintiff as aforesaid, the sum of Thirty thousand Dollars, with the sum of Five hundred and eighty and 18/100 Dollars, costs of this action against

said defendants, in all amounting to the sum of Thirty thousand five hundred and eighty and 18/100 ($30,580.18) Dollars, for which amount judgment is rendered this 18th day of December, 1911.

Entered Dec. 18, 1911, 9 a. m.

Dated New York, December 18th, 1911.

JOHN F. HENNESSY,
Dep. Clerk.

* * * * * * *

48 Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE, THOMAS A. MCINTYRE, JR., and GEORGE C. RYAN, Defendants.

The defendants John G. McIntyre and Thomas A. McIntyre Jr., submit the annexed statement of the facts which they deem established by the evidence herein and of the rulings upon questions of law which they desire made.

Dated, November 28th, 1911.

PATTON & PATTON,
Attorneys for Defendants, John G. McIntyre and Thomas A. McIntyre, Jr.

49 *Requests to Find by Defendants John G. McIntyre and Thomas A. McIntyre, Jr.*

Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE, THOMAS A. MCINTYRE, JR., and GEORGE C. RYAN, Defendants.

Findings of Fact.

1. That on the 5th day of January, 1908, the defendants Thomas A. McIntyre, John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan, were partners under the firm name of T. A. McIntyre & Company doing business as stock and cotton brokers in the City of New York.

Found. J. A. K.

2. Prior to February 5, 1908, one George W. Kavanaugh a brother of the plaintiff was trading in stock and cotton with a brokerage firm of A. O. Brown & Company, with whom he had a stock account and a short account in cotton for the sale of 500 bales of cotton for May delivery.

Found. J. A. K.

50 3. Prior to February 5, 1908, George W. Kavanaugh transferred all his interest in his stock account with A. O. Brown & Company to the plaintiff.
Found. J. A. K.

4. On the 5th day of February, 1908, the firm of T. A. McIntyre & Company on the request of the plaintiff, took over from A. O. Brown & Company the stock account and stocks belonging to the plaintiff and paid A. O. Brown & Company the sum of $3,853.32 the amount due to A. O. Brown & Company from the plaintiff on account of said stock, and received from A. O. Brown & Company the certificates of stock described in the plaintiff's complaint.
Found. J. A. K.

5. That at the same time there was also taken over by said firm of T. A. McIntyre & Company from A. O. Brown & Company the cotton account for the sale of 500 bales of cotton for May delivery.
Found. J. A. K.

6. That at the time of taking over of said stock account and the receipt of said stock by said firm of T. A. McIntyre & Company, it was understood between the plaintiff and the firm of T. A. McIntyre & Company that the stock was deposited with said firm on margin.
Not Found. J. A. K.

7. No demand was made upon the said firm of T. A. McIntyre & Company or the members thereof prior to the appointment of the Receivers in Bankruptcy for the return of said stocks.
Found. J. A. K.

8. There is no evidence that T. A. McIntyre & Company did not have on hand at all times after the receipt of said certifi-
51 cates of stock shares of stock similar in kind and amount to that received, applicable to the plaintiff's account.
Not Found. J. A. K.

9. That none of the dealings between the plaintiff herein or his brother George W. Kavanaugh were had with the defendant John G. McIntyre or the defendant Thomas A. McIntyre, Jr.
Not Found. J. A. K.

10. That neither of the defendants John G. McIntyre nor Thomas A. McIntyre Jr. knew of or participated in the taking over of the stock of the plaintiff or the account from A. O. Brown & Company; or of the sale or hypothecation or disposal of said certificates of stock so received from said A. O. Brown & Company until after the filing of the petition in Bankruptcy against said firm in April, 1908.
Not Found. J. A. K.

11. That the duties of John G. McIntyre as a member of said firm of T. A. McIntyre & Company were in the execution of orders

for the purchase and sale of stocks on the floor of the Stock Exchange in the City of New York: And that the duties of said Thomas A. McIntyre Jr. were in the execution of orders for the purchase and sale of cotton on the Cotton Exchange in the City of New York; that neither the said John G. McIntyre nor the said Thomas A. McIntyre Jr. had anything to do with the handling of the stocks or securities in the possession of said firm, neither of them knew prior to the filing of the petition in Bankruptcy against said firm that the plaintiff had an account or had any stocks or scrip with said firm.

Not Found. J. A. K.

52 12. That on the 23rd day of April 1908, an involuntary petition in Bankruptcy was filed against the firm of T. A. McIntyre & Company in the United States District Court, Southern District of New York.

Found. J. A. K.

13. That on the 22nd day of May 1908, the firm of T. A. McIntyre & Company and the individual members thereof were adjudicated Bankrupts by the United States District Court, Southern District of New York.

Found. J. A. K.

14. That on the 24th day of July 1908, Charles C. Burlingham and Arthur A. Peck and Albert W. Bonynge were duly appointed Trustees in Bankruptcy for the firm of T. A. McIntyre & Company and that the said Trustees thereafter qualified as such.

Found. J. A. K.

15. That thereafter the plaintiff in this action proved his claim against the Bankrupts' estate and the same was allowed by the Referee in Bankruptcy in the sum of $23,124.73.

Found. J. A. K.

16. That thereafter the defendants John G. McIntyre and Thomas A. McIntyre, Jr., duly filed their petition for a discharge in Bankruptcy and on the 24th day of January 1911, an order was duly entered in the United States District Court for the Southern District of New York, granting the defendants, John G. McIntyre and Thomas A. McIntyre Jr., a discharge in Bankruptcy in accordance with the United States Statutes relating to Bankruptcy.

Found. J. A. K.

53 *Conclusions of Law.*

1. That the discharge in Bankruptcy of John G. McIntyre forever released and discharged him individually and as a member of the firm of T. A. McIntyre & Company from any and all obligation of any kind and nature which he ever had any time incurred to the plaintiff because of the matters and things which are the subject of this action, and the said discharge in Bankruptcy is a bar as re-

gards the defendant John G. McIntyre to the subject matter of this action.

Not Found. J. A. K.

2. That the discharge in Bankruptcy of Thomas A. McIntyre Jr., forever released and discharged him individually and as a member of the firm of T. A. McIntyre & Company from any and all obligation of any kind and nature which he ever had any time incurred to the plaintiff because of the matters and things which are the subject of this action, and the said discharge in Bankruptcy is a bar as regards the defendant Thomas A. McIntyre Jr. to the subject matter of this action.

Not Found. J. A. K.

3. That the sale and disposition of said certi-cates of stock received from A. O. Brown & Company by said firm of T. A. McIntyre & Company did not constitute a wilful and malicious injury to the property of the plaintiff within the meaning of Section 17 of the Bankruptcy Act of the United States of 1898, and of the amendments thereto.

Not Found. J. A. K.

4. That the plaintiff was not entitled to a return of the identical certificates of stock which the firm of T. A. McIntyre & Com-
54–59 pany received from A. O. Brown & Company if the firm had on hand at all times a sufficient number of shares of stock of like kind, quality and amount although bearing different certificate numbers.

Not Found. J. A. K.

5. That plaintiff having failed to prove that there was not on hand stocks similar in kind and quality and amount to those received from A. O. Brown & Company to meet the demands of the plaintiff, and there being no proof of any demand having been made on said firm or the members thereof for a return of said stock, the plaintiff failed to prove a conversion of said stocks.

Not Found. J. A. K.

6. The defendants John G. McIntyre and Thomas A. McIntyre, Jr., are entitled to a judgment on the merits with costs, and I direct judgment accordingly.

Not Found. J. A. K.

November 29th, 1911.

Requests disposed of as marked in margin.

J. A. KELLOGG,
Justice of the Supreme Court of the State of New York.

* * * * * * *

60 *Exceptions of Defendants John G. McIntyre and Thomas A. McIntyre, Jr.*

Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE, and THOMAS A. MCINTYRE, JR., Defendants.

SIRS: Please take notice that the defendants John G. McIntyre and Thomas A. McIntyre Jr., above named and each of them hereby except to the decision of Mr. Justice J. A. Kellogg herein filed in the office of the Clerk of Saratoga County and entered therein in the above entitled action on the 18th day of December 1911 in the following particulars, to wit:

I. To so much of the finding of fact in said decision set forth and numbered Fifth, as finds that the cotton account taken over from A. O. Brown & Co. by T. A. McIntyre & Co., does not in any way affect the stock transactions of the plaintiff with the said firm of T. A. McIntyre & Co.

II. To the finding of fact in said decision set forth and numbered Eighth as finds that the defendants John G. McIntyre
61 and Thomas A. McIntyre Jr., or either of them disposed of the plaintiff's stocks received from A. O. Brown & Company.

III. To the conclusion of law stated as a finding of fact in said decision set forth and numbered Eighth, as finds that the defendants John G. McIntyre and Thomas A. McIntyre, Jr. with other members of said firm committed willful or malicious injury to the property of the plaintiff.

IV. To the conclusion of law set forth and numbered First in said decision and each and every part thereof.

V. Said defendants, John G. McIntyre and Thomas A. McIntyre, Jr. further except to so much of the conclusion of law numbered First in said decision as finds and decides that under subdivision 2 of Section 17 of the Bankruptcy Law of the United States the debt involved herein is not a dischargeable debt and survives the discharge in bankruptcy of the defendants John G. McIntyre and Thomas A. McIntyre Jr., on the ground that the Court failed to give due and proper force and effect to the discharge in Bankruptcy granted to the defendants John G. McIntyre and Thomas A. McIntyre, Jr. by the District Court of the United States for the Southern District of New York under and in pursuance of the Act of Congress as approved July 1, 1898, entitled An Act to Establish a Uniform System of Bankruptcy throughout the United States, and the amendments thereto, and thereby denied to these defendants a right, privilege and immunity under said acts of Congress.

VI. To the conclusion of law numbered Second in said decision.

62 VII. To the refusal of the Court to find as requested in paragraph numbered 6 of the findings of fact submitted by these defendants.

VIII. To the refusal of the Court to find as requested in paragraph numbered 8 of the findings of fact submitted by these defendants.

IX. To the Court's refusal to find as requested in paragraph numbered 9 of the findings of fact submitted by these defendants, that none of the dealings between the plaintiff and his brother George W. Kavanaugh were had with the defendant John G. McIntyre or the defendant Thomas A. McIntyre, Jr.

X. To the refusal of the Court to find as requested in paragraph numbered 10 of the requests submitted by the defendants.

XI. To the Court's refusal to find as requested in paragraph numbered 11 of the findings of fact submitted by the defendants.

XII. To the Court's refusal to find as requested in paragraph numbered 1 of the conclusion of law submitted by the defendants that the discharge in bankruptcy of John G. McIntyre, forever released and discharged him individually and as a member of the firm of T. A. McIntyre & Co. from any and all obligations of any kind or nature which he at any time incurred to the plaintiff because of the matters and things which are the subject of this action; or to find that the said discharge in bankruptcy is a discharge as to John G. McIntyre to the subject matter of this action.

XIII. To the Court's refusal to find as requested in paragraph 2 to the conclusion of law submitted by the defendants that
63 the discharge in bankruptcy of Thomas A. McIntyre, Jr., released and discharged him individually and as a member of the firm of T. A. McIntyre & Co. from all obligations of any kind or nature which he at any time incurred to the plaintiff because of the matters which are the subject matter of this action; or to find that the said discharge in bankruptcy is a bar as regards the said Thomas A. McIntyre, Jr., to the subject matter of this action.

XIV. To the Court's refusal to find as requested in paragraph 3 of the conclusion of law submitted by the defendants that the sale and disposition of said certificates of stock received from A. O. Brown & Co., by said firm of T. A. McIntyre & Co. did not constitute a willful and malicious injury to the property of the plaintiff within the meaning of Section 17 of the Bankruptcy Act of the United States of 1898 and of the amendments thereto.

XV. To the Court's refusal to find as requested in paragraph numbered 4 of the conclusion of law submitted by the defendants, that the plaintiff was not entitled to the return of the identical certificates of stock which the firm of T. A. McIntyre & Co. received from A. O. Brown & Co., if the firm of T. A. McIntyre & Co. had on hand at all times a sufficient number of shares of stock of like kind, quality and amount although bearing different certificate numbers.

XVI. To the Court's refusal to find as requested in paragraph numbered 5 of the conclusions of law submitted by the defendants.

XVII. To the Court's refusal to find as requested in paragraph

numbered 6 of the conclusions of law submitted by the defendants.

64–66 XVIII. The defendants, John G. McIntyre and Thomas A. McIntyre Jr., each excepts to the judgment entered against him in favor of the plaintiff entered herein on the 18th day of December 1911, for the sum of $30,580.18 and to each and every part of said judgment and the whole of it.

Dated, New York, December 22nd, 1911.

Yours, &c.,

PATTON & PATTON,
Attorneys for Defendants
John G. McIntyre and Thomas A. McIntyre, Jr.

40 Wall Street, New York City.

To the Clerk of the County of Saratoga; Myer Nussbaum, Esq., Plaintiff's Attorney.

* * * * * * *

67 *Case.*

Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE, and THOMAS A. MCINTYRE, JR., Defendants.

The issues in this case came on for trial before the Honorable Joseph A. Kellogg, Justice, without a jury at a Trial Term of the Supreme Court at the Court House at Ballston Spa, in the County of Saratoga, on the 6th day of November, 1911.

68 Appearances:

Myer Nussbaum, Esq., Attorney for Plaintiff.
John J. O'Connell, Esq., Attorney for Defendant, Edward T. White.
Robert H. Patton, Esq., Attorney for Defendants, John G. McIntyre and Thomas A. McIntyre, Jr.

FREDERICK W. KAVANAUGH, the plaintiff being duly sworn, testified in his own behalf as follows:

I am the plaintiff and reside at Waterford, New York. Prior to February 5th, 1908 I had dealings with A. O. Brown & Co. I was the owner of certain stocks that were in their possession.

Paper shown witness.

Q. Is that a list of the stocks and securities?

A. Yes, sir. There was due on those stocks $3,853.32. I instructed T. A. McIntyre & Co. by telephone to go to A. O. Brown & Co. and get those stocks and to pay A. O. Brown & Co. what I was indebted to them.

Paper shown witness.

I got that paper in due course of the mail.

Paper offered in evidence and marked Plaintiff's Exhibit 1.

69 T. A. McIntyre & Co., 71 Broadway.

NEW YORK, Feb. 5, 1908.

Mr. F. W. Kavanaugh.

DEAR SIR: Complying with your instructions of — we have this day received from A. O. Brown & Co. the following securities paying $3,853.32 for same:

100 M. K. T. 100 M. P. 200 Pipe.
200 M. K. T. pr. 100 Erie I $100 Erie I Scrip.
$250 Mo. P. Scrip.

Yours truly,

T. A. McINTYRE & CO.,
Per A. EDGECOMBE.

I never authorized or instructed the firm of T. A. McIntyre & Co. to sell, dispose — or hypothecate the stocks.

Mr. Nussbaum: I ask to amend the complaint by inserting the stock which was omitted in the amended complaint.

Mr. Patton: I object to the amendment.

The Court: The amendment is allowed.

Q. What does 100 M. K. & T. mean?

A. 100 M. K. & T. means 100 Missouri, Kansas & Texas, represented by certificate No. 20163, 200 Missouri, Kansas.

70 Q. Explain what the abbreviations mean and only that now?

A. 200 Missouri, Kansas & Texas preferred, 100 Missouri Pacific, 100 Erie first, 200 Cast Iron Pipe, 250 Missouri Pacific scrip, 200 Erie first scrip. After turning over said stocks to the defendants as copartners, I never consented to the sale or disposition of them by said firm, nor did they ever demand the loan or call for the loan. These defendants have never offered to return those stocks or the proceeds. They never notified me of any sale.

Cross-examination:

I telephoned T. A. McIntyre & Co. from Waterford. I do not know which member of the firm of T. A. McIntyre & Co. I telephoned or spoke to. I do not remember whom I asked for. I did not know any member of the firm at that time. I think I had met Ryan. I do not believe I had ever met White.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

The Court: An objection will be recorded to all this line of testimony which objection is overruled.

Exception.

I think the first time I saw him was the day I was at the Bankruptcy hearing. I think I telephoned T. A. McIntyre & Co. on the 5th of February.

Q. Is it not a fact that it was your brother George who
71 made all the *the* arrangements about taking the stock from A. O. Brown & Co.?

A. Yes, sir; he made the arrangements. After he made the arrangements then I telephoned the company. I was trading with A. O. Brown & Co. These stocks were not put up with A. O. Brown & Co. to cover the cotton account.

Q. You had a cotton account with A. O. Brown & Co.?

A. No, sir. My brother George may have had but I did not.

Q. What were they put up for?

A. They simply held them there. I do not remember how much money I put up with A. O. Brown & Co. I bought them through them, if I remember right. It was no margin at all. This is a kind of an old thing. It is a large amount. I do not remember now whether I bought them outright through A. O. Brown & Co. The value had been paid for the stocks except this amount of $3,853.32. When that was paid we would own it outright. They had bought them for me and I had paid all the purchase price except that, as I remember the transaction. I asked McIntyre & Co. to take over those stocks and pay the balance. I had no talk with them about any cotton account.

Letter marked Defendant's Ex. A for Identification shown witness.

Q. Look at that paper and state if you received a letter of which that is a copy?

A. I do not remember receiving this letter. I will not say I did not, for I do not positively remember.

Q. You say on February 5th, you telephoned T. A. McIntyre & Co. Were you at that time short 500 May cotton at 10.27 in the office of A. O. Brown & Co.?

72 A. I do not remember. I do not remember any cotton account. My brother George was running my Wall Street transactions at about that time. As a rule he had to confer with me as to how he was doing it. The stock account was in my name. I do not remember the cotton account being in my name. I never had any dealings in cotton. I never had any cotton transactions. I do not remember whether I gave orders to A. O. Brown & Co. to purchase these particular stocks. Possibly my brother did. He made all the arrangements to transfer the account to T. A. McIntyre & Co. He was very friendly with the McIntyre people. I do not know which one. I do not know which one of the McIntyre firm he was friendly with

Q. Were not these stocks really put up to cover the cotton account or prospective speculative accounts?

Objected to as incompetent, irrelevant and immaterial.
Objection overruled.
Exception.

A. No, sir; not necessarily.
Q. What do you mean by not necessarily?
A. I had them there so if the market ever got right they were in New York where I could deliver them qu[illegible] if I made disposition of them. Some of us are trading in the ma[illegible] all the time. I have traded quite a little. I have been trading in the market for a few years.
Q. Did you not know that you did not have to have stocks in New York for the purpose of disposing of them quickly?
A. I do not think I did.

73 The Court: What is the purpose of this examination?
Mr. O'Connell: To show that they were up as a margin for a speculative account.
The Court: Did they have a right to take them away from him because they were up for a speculative account?

Q. Did you know of the pendency of the bankruptcy proceedings?
A. Yes. I got notice of the first meeting of creditors.

(It was conceded by the defendants that when the plaintiff filed his proof of claim in bankruptcy he reserved all his rights as to this action.)

This account with A. O. Brown & Co. was opened originally in my brother's name. It was changed possibly a year prior to February 5, 1908. I do not know whether this cotton account was in the name of my brother when it was turned over. My brother put the money in there to purchase the stocks originally. I do not know what stocks were originally purchased by him in this account. I do not know how long the account had been running with A. O. Brown & Co. I do not remember what stocks were in the account when it was changed from my brother's name to mine. I do not remember that there was any change of stocks in the account from the time it was transferred to my name to the time it was taken over by T. A. McIntyre & Co. I do not remember whether I gave any orders to A. O. Brown & Co. prior to February 5, 1908, for the purchase or sale of stocks in this account. I did not pay A. A. Brown & Co., any money of my own. I only gave one instruction to T. A. McIntyre & Co. in reference to this account. Prior to the
74 hearing in bankruptcy I never saw John G. McIntyre or Thomas A. McIntyre, Jr. I had the memorandum of stocks before me when I talked with T. A. McIntyre & Co. over the telephone, and I told them to take over those stocks and pay so much money.
Q. Do you claim $250 of Missouri Pacific scrip?
A. Yes, sir.
Q. Represented by certificates A41254 and A41252?
A. Whatever the list shows there.
Q. You claim to have been the owner of certificates A41254 and A41252?

A. I do not remember anything about the numbers of the certificates.

Q. You do not claim that you are the owner of those particular certificates, but of so many shares?

A. So many shares.

Q. But not referring to any particular certificates?

A. No, sir.

Q. Is that same thing true in reference to all the shares of stock, does the same answer apply to the stock as to the scrip?

A. Certainly.

Redirect examination:

Prior to the 5th day of February, 1908, my brother, George, owed me some money and those stocks and scrip were turned over in payment of that money.

Plaintiff offered in evidence statements of account received by the plaintiff from T. A. McIntyre & Co. One dated Feb. 29, 1908, was marked Ex. 2, one undated, was marked Ex. 3, one dated March 31, 1908, was marked Ex. 4 and one dated April 24th, 1908, was marked Ex. 5.

(PLAINTIFF'S EX. 2.)

NEW YORK, Feb. 29, 1908.

M-. F. W. Kavanaugh in account with T. A. McIntyre & Co.
Folio —.

Date.			Amount.	Days.	Interest.
1908.					
Feb.	5.	To 100 M. K. T. Rec.			
"	"	200 " pfd. "			
"	"	100 Mo. Pac. "			
"	"	100 Erie I "	3,853.32	24	15.41
"	"	200 Pipe "			
"	"	$100 Erie I Scrip "			
"	"	$250 Mo. Pac. Scrip "			
"	29.	Interest 6% to 4¾%	12.20	....	.....
Feb.	29.	To Balance	3,865.52	....	15.41
			3,865.52	....	.....
		100 M. K. T.	.....	....	.....
		200 " pfd.	.....	....	.....
		100 Mo. Pac.	.....	....	.....
		100 Erie I	.....	....	.....
		200 Pipe	.....	....	.....
		$100 Erie I Scrip	.....	....	.....
		$250 Mo. Pac.	.....	....	.....
Date.			Amount.	Days.	Interest.
1908.					
Feb.	29.	By Balance	3,865.52	....	15.41

FREDERICK W. KAVANAUGH.

23

NEW YORK, —— —, ——.

M-. F. W. Kavanaugh in account with T. A. McIntyre & Co.

Folio —.

Date.				Amount.	Days.	Interest.
1908.						
Mar.	31.	To Balance		3,880.50	24	15.52
Apr.	24.	Interest		15.52	....	.....
"	"	2 Mo. Pac. Rcd.		.....	....	.....
"	"	Balance		23,142.73	....	.....
				27,038.75	....	15.52
				.....	....	15.52
Apr.	24.	By Int. to Bal.		400.	....	.....
May	9.	Div. 200 M. K. T. pfd.		2,525.	....	.....
Apr.	24.	100 M. K. T.	25¼	4,550.	....	.....
"	"	100 Mo. Pac.	45½	4,800.	....	.....
"	"	200 Pipe	24	11,200.	....	.....
"	"	200 M. K. T. pfd.	56	3,450.	....	.....
"	"	100 Erie I.	34½	.....	....	.....
"	"	$200 Mo. Pac. Scrip del.		22.75	....	.....
"	"	$50 Mo. Pac. Scrip	45½	91.	....	.....
"	"	2 Mo. Pac.	45½	27,038.75	....	15.52
Apr.	24.	By Balance		23,142.73	....	.....

JOHN G. MC INTYRE VS.

(PLAINTIFF'S EX. 4.)

NEW YORK, Mar. 31, 1908.

4—408

M-. F. W. Kavanaugh in account with T. A. McIntyre & Co.

Folio —.

Date.		Amount.	Days.	Interest.
1908.				
Feb. 29.	To Balance	3,865.52	31	19.97
Mar. 31.	Interest 4½	14.98	....	.....
		3,880.50	....	19.97

Date.		Amount.	Days.	Interest.
1908.				
Mar. 31.	To Balance	3,880.50	....	.....
	100 M. K. T. 100 Erie I	.....	....	.....
	100 Mo. Pac. $250 Mo. Pac. Scrip	.....	....	.....
	200 Pipe $100 Erie I	.....	....	.....
	200 M. K. T. pfd.	.....	....	.....

Date.		Amount.	Days.	Interest.
Mar. 31.	By Balance	3,880.50	....	19.97
		3,880.50	....	19.97

FREDERICK W. KAVANAUGH.

25

(PLAINTIFF'S EX. 5.)

NEW YORK, April 24th, 1909.

Mr. F. W. Kavanaugh in account with T. A. McIntyre & Co.

Folio—.

Date.		Amount.	Days.	Interest.
1908.				
March 31.	To Balance	3,880.50	....	.....
	100 M. K. T. 100 Erie I	.....	....	.....
	100 Mo. Pac. 200 M. K. T. pfd	.....	....	.....
	200 Pipe 100 Erie I Scrip	.....	....	.....
	$250 Mo. Pac. Scrip	.....	....	.....
April 24.	Interest	15.52	....	.....
"	2 Mo. Pac. Recd.	.....	....	.....
"	Balance	23,142.73	....	.....
		27,038.75	....	.....

Date.		Amount.	Days.	Interest.
May 9.	By Div. 200 M. K. T. pfd	400.00	....	.....
April 24.	100 M. K. T. 25¼	2,525.00	....	.....
"	100 Mo. Pac. 45½	4,550.00	....	.....
"	200 Pipe 24	4,800.00	....	.....
"	100 Erie I 34½	3,450.00	....	.....
"	200 M. K. T. pfd. 56	11,200.00	....	.....

"	100 Erie Scrip Del.	.....	....	.....
"	$50 Mo. Pac. Scrip 45½	22.75	....	.....
"	2 Mo. Pac. 45½	91.00	....	.....
"	200 Mo. Pac. Scrip Del.	.....	....	.....
		27,038.75	....	.....
April 24.	By Balance	23,142.73	....	.....

I received these statements from T. A. McIntyre & Company.

79 GEORGE W. KAVANAUGH, a witness called for the plaintiff testified:

I reside in Waterford, New York. Have been in business there twenty years and know the firm of A. O. Brown & Co. Their business was that of stock brokers. I have dealings with them. I purchased the stocks and scrip mentioned in the complaint herein of A. O. Brown & Co. I turned it over to my brother in April, 1907. I was indebted to him; I took that means of securing him. With reference to this cotton account I had sold a contract of May cotton. That means cotton to be delivered in May or any time before that. I sold it when I did not have it. I had to buy it. There was $3,853.32 owing A. O. Brown & Co. when I transferred the account to my brother.

Statement of cotton account shown witness.

That is a statement of the cotton account. These stocks were not up to secure that account. I had no security for the cotton account.

Plaintiff offered in evidence a statement of A. O. Brown & Co. of purchase and sale of 500 bales of cotton, May delivery for the account of G. W. Kavanaugh.

Received and marked Plaintiff's Ex. 6.

80 A. O. Brown & Co., 30 Broad Street.

Statement of Purchase and Sale of 500 *Bales Cotton, May Delivery, for Account of M-. G. W. Kavanaugh.*

		Bought.				Sold.		
2–5	500	10.27	51.35	11–20	500	10.30	51.50
			51.35				51.50

Difference 15 Points
Commission 75
75

New York, Feb'y 5th, 1908.

A. O. BROWN & CO.,
Per A. M.

Net Even.

I told George C. Ryan of the firm of McIntyre & Co. that the cotton account was mine and that I would take care of it. He said that was satisfactory. I was in there from time to time. They never asked me for any money. I was there and ordered the purchase of the cotton to fill a contract myself on the 18th of March. I owned the stocks turned over to McIntyre & Co. before they were turned over to my brother. But I owed the amount stated on the stock.

Cross-examination:

I did not give Brown & Co. any orders about any account after February 5, 1908. I did not authorize them to turn over the cotton

account. Brown & Co. never closed out my cotton account with them. They were not given authority from me to transfer it.

81 When I discovered that it had been transferred I talked with Mr. Ryan of the firm of McIntyre & Co. I never had any conversation with Brown & Co. after this transfer took place.

Q. If that account was not transferred how did you expect A. O. Brown & Co. to close out the short sale? You had a contract with them, you had sold short?

A. Yes, sir.

Q. How did they close out that contract with you?

A. They transferred it to McIntyre evidently in the name of my brother.

Q. But you did not recognize that transfer?

A. I never called on Brown & Co. again.

Q. How did you suppose the contract could ever be closed out?

A. When I saw this order I said there is no use making any fuss and let it go at that. By order I mean the McIntyre statement that they had taken the cotton. I saw the statement that they had taken over the cotton. I do not know whether it was sent to my brother or not.

Q. Did you take any action on your part?

A. I do not know whether I did or not. I know nobody ever asked for any margin on the cotton account, or any other account.

Q. You are quite sure of that?

A. Yes, sir.

Q. McIntyre & Co. never asked for a margin?

A. No, sir. So far as I am concerned. If they had asked my brother I think he would have spoken of it.

Q. You were perfectly satisfied that it was taken over?

A. I knew it had been taken over and there wasn't any use of switching it back again.

Q. I understand you to say that the cotton account should not have been taken over?

A. Yes.

82 Q. If you had not authorized it to be taken over then there would still be a claim under your contract with Brown?

A. I did not want to be unfair and dishonest.

Q. And you thought it would be unfair and dishonest to say you had not authorized it?

A. If I had allowed the trade to be made in two houses.

Q. You think that would have been dishonest?

A. It would be.

By the Court:

Q. You could play it either way then?

A. Yes, sir.

To Mr. Patton:

Q. As a matter of fact did not your brother know that this account was taken over?

A. I do not know what my brother knew.

Q. Did you communicate to him your talk with Mr. Ryan about this?

A. No, it was not his affair.

Q. Did you tell him that this account had been taken over?

A. I did not tell him. He called my attention to the fact that the account had been taken over, and I said I would straighten the matter with Ryan.

Q. Your brother called your attention to the matter?

A. I think so.

Q. That the account had been taken over?

A. Yes, sir; and that I should take it up with McIntyre & Co. It didn't cost McIntyre & Co. a penny to carry that cotton account.

I had known Ryan before this time. I never knew White until I met him afterwards. All of my business dealings were
83 done with Mr. Ryan. I had a conversation with John G. McIntyre in the office several times. Between February 5, and the failure I brought in a friend with me and introduced him to John G. McIntyre. It was in the early part of April, 1908. I had seen him around the office every time I was in there.

Q. How often were you in the office?

A. I was in there perhaps four or five times in six weeks. When I was in New York I would go there to see if I could get out of my cotton without losing any money.

Mr. Patton: I move to strike out the latter part of the answer. Motion granted. Exception taken.

It is conceded that Thomas A. McIntyre is dead and the action as to him has not been revived. Also that Edward T. White, John G. McIntyre and Thomas A. McIntyre, Jr., each received their discharge in bankruptcy since the commencement of this action. It is also conceded that the action has been severed as to George C. Ryan and he has not been served with process, and that the plaintiff proceeds on the theory as to him that a discharge in bankruptcy was denied to said Ryan.

HARRY GOLDING, called as a witness for the plaintiff was duly sworn and testified:

I reside at Richmond Hill, am a bookkeeper, at present for the Trustees of T A. McIntyre & Co. and have been with them
84 since their election as trustees some time in 1908, and was in the employment of T. A. McIntyre as bookkeeper up to the date of their failure. I have made excerpts from the account of the plaintiff. I find in the books of McIntyre & Co. *in* reference to the account of the plaintiff as regards the stocks. I have all the blotters here of McIntyre & Co. which cover all of this memorandum on this list of stocks. Ex. Clearing house blotter, folio G, 35, shows T. A. McIntyre & Co. paid $3,853.32 to A. O. Brown & Co. and received the following stocks for them for the account of F. W. Kavanaugh: Feb. 5, 1908, 100 shares Missouri Pacific, certificate No. A28770, A35974, A38741, A41015, for 25 shares each; 100 shares Erie first,

certificate No. M7696; 100 shares Missouri, Kansas & Texas, certificate No. O20163; 200 shares Missouri, Kansas & Texas preferred, certificates No. A10581 to 10600 inclusive, 10 shares each; 200 shares Cast Iron Pipe, certificates Nos. 7504, 4665, 100 shares each; $250 Missouri scrip, A41252, A41254, for two shares each, and gave in change certificate No. A39488 for one share, and certificate No. 926 for ½ share. They received two full shares and ½ share to make up the difference. That is the record on that blotter. Ex. clearing house blotter contains a record of all the sale of stocks and the stock numbers delivered on those sales. Folio F. 790, that blotter shows that under date of Feb. 6, 1908, T. A. McIntyre & Co. delivered to S. L. Blood & Co. certificate- No. A28770, A35974, A38741, A41015 for 25 shares each, Missouri Pacific, account of loan and received their check for $4,200. The bank deposit book of T. A. McIntyre &
Co., No. 12, folio 94, shows that that check for $4,200 was
85 deposited in the National Bank of Commerce on Feb. 6, 1908, to the credit of T. A. McIntyre & Co. That was the identical amount and the same check.

Ex Clearing house blotter dated Feb. 10, 1908, folio F, delivered to Barton 100 shares Erie first account of loan and received their check for $3,000. Deposit book No. 12, folio 103; that check was deposited in the National Bank of Commerce Feb. 10, 1908, to the credit of T. A. McIntyre & Co. I think that was a loan transaction but I did not trace the matter as to whether they were paying back a loan or getting a new one, that would indicate the advance of money for which they gave up the stock.

Clearing house blotter March 18, 1908, folio F, 677, shows, delivered to Asiel & Co. certificate No. O20163 for 100 shares Missouri Kansas & Texas together with 200 shares of stock, there being 300 shares due them on the day's transaction in the stock, and received their check for $6,900. That check was deposited in the National Bank of Commerce March 18, 1908, to the credit of T. A. McIntyre & Co.

Clearing house blotter February 14, 1908, folio F, 551, delivered to Post & Flagg certificates No. A10581 to A10590 inclusive, for ten shares each, Missouri Kansas & Texas, preferred, and received their check for $5,400. Bank book shows check for $5,400 was deposited in the National Bank of Commerce Feb. 14, 1908 to the credit of T. A. McIntyre & Co. Delivered to Jewett Bros. certificates Nos. A10591 to A10600, inclusive, for ten shares each of Missouri, Kansas & Texas preferred and received their check for $5,400. Bank book shows check was deposited in the National Bank of Commerce Feb.
14, 1908 to the credit of T. A. McIntyre & Co.

86 Ex clearing house blotter dated Feb. 25, 1908 folio F, 1908, delivered to A. Mestre & Co. certificates Nos. 7504, 4665, for 100 shares each, Cast Iron Pipe, together with certificate No. 7293 for 100 shares and received their check for $5,625. Bank book shows check was deposited in the National Bank of Commerce Feb. 25, 1908 to the credit of T. A. McIntyre & Co.

Ex clearing house blotter dated Feb. 11, 1908, folio F, 1822, delivered to C. R. Schott certificate No. A41254 for two shares Mis-

souri Pacific stock as part of 40 shares sold to him and received his check for $1,520. Bank book shows Schott check for $1,520 was deposited in the National Bank of Commerce Feb. 11, 1908, to the credit of T. A. McIntyre & Co.

Ex clearing house blotter dated Feb. 20, 1908 folio 1888, delivered to C. G. Abercrombie & Co. certificate No. A41250 for two shares Missouri Pacific stock without money. In reference to the Missouri Pacific delivered to S. Blood & Co. and the Erie the blotter reads, for stock loan account. I did not trace to see whether in reference to that loan they were paying back stock which they had borrowed or whether they were loaning that stock to Blood. Having the check at the same time it would indicate that they had borrowed that money from Blood or have loaned the stock to Blood and had received that amount of money for it. Mr. Edgar Camp was an employee of McIntyre & Co. at that time.

Cross-examination by Mr. O'Connell:

Defendant's Ex. A for identification, being a letter book shown witness.

87 Defendant's Exhibit A for identification of this date page 318, letter press copy book, came from the Trustees in Bankruptcy office. It being one of the letter books among the books of T. A. McIntyre & Co. It has been in the possession of said Trustees in Bankruptcy since their appointment, prior to that it was in the possession of the Receivers. The receivers were also Trustees, excepting there was one more trustee than receiver. Said book is marked on the front of the cover No. 2, letters and it is marked in blue lead pencil. On the edge of said book or the back of the cover is G. C. R. and No. 2. All these things are printed on the back of the book except the No. 2 and that seems to be in ink. The others are all printed in ink with a pen and in capitals. I recognized the letter on page 318. The handwriting signed to that copy. It is George C. Ryan's. That was the copy book in the office up to the time of the failure, and that copy book was supposed to contain copies of letters actually sent out.

Page marked Defendants' Exhibit A offered in evidence by the defendants.

Objected to on the ground that it is incompetent, inadmissible and irrelevant.

The Court: You do not require them to produce the original?

Mr. Nussbaum: No, sir.

Objection overruled.

Exception.

88 February 5th, 1908.

Mr. Frederick W. Kavanaugh, Waterford, New York.

DEAR SIR: We have your favor of the 4th inst. and as instructed in same *same* we received from A. O. Brown & Co. these stocks. 200 M. K. & T. preferred; 100 M. K. & T. common; 100 Missouri Pacific; 100 Erie 1st preferred; $100 Scrip Erie 1st, preferred; $250. Scrip,

Missouri Pacific, together with 200 Cast Iron Pipe paying them for the same $3,853.32. Also took over from them for your account 500 short May cotton at 10.27 all of which we trust you will find in order and satisfactory. Thank you for the account and trust our relations will be both pleasant and profitable and awaiting your further pleasure, we are

Yours very truly,

T. A. McINTYRE & CO.

I was bookkeeper for McIntyre & Co. one year prior to the failure. Before that I was employed by Hecker Jones & Milling Co. T. A. McIntyre, Sr., of the firm of McIntyre & Co., hired me; I knew him while he was at the Hecker & Jones Co. He was a director there. Shortly after that I came with T. A. McIntyre & Co. I became head bookkeeper.

Q. What instructions, if any, did T. A. McIntyre, Sr., give you concerning those books as to who should be permitted to see them, etc.?

89 Objected to as incompetent inadmissible, irrelevant and not binding upon the plaintiff.

Objection overruled; exception.

A. I do not know that Mr. T. A. McIntyre, Sr. ever gave me any direct instructions regarding that. He told me to take instructions from Mr. Wheeler. He was the cashier. He was a brother-in-law of mine.

Q. What instructions were afterwards given to you at any time prior to February, 1908, as to permitting Mr. White to examine and look into those books?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception.

A. Mr. Wheeler said to me sometime in May, 1907, that I was not to give Mr. White any information whatever from my books.

Q. Did you live up to those instructions?

Objected to as calling for a conclusion.

The Court: You may ask him whether he permitted him access to the books.

A. I do not recollect that Mr. White ever asked me to have access to the books. So far as my knowledge goes he never had access to the books otherwise than to taking the matter up of writing letters regarding the debit balances that were on the books. I mean by that the people who owed money to the firm.

90 Q. Do you not know of your own knowledge as head bookkeeper that for many months prior to the failure Mr. White's powers and duties in the concern had been very much curtailed by T. A. McIntyre, Sr.

Objected to as calling for a conclusion.

Objection sustained; exception.

—. I have testified from the stock blotters of T. A. McIntyre & Co.

Q. Was there any other accounts with Frederick W. Kavanaugh on the books?

Objected to as incompetent, irrelevant and immaterial.
Objection overruled; exception.

A. There was an option account on the books. I have the original entry, the loose leaf ledger. I have the account which was contained in the loose leaf ledger. I took the original sheets out of the ledger for convenience. Two sheets offered in evidence.

Objected to as incompetent and immaterial.
Objection overruled; exception.

To the Court: That account seems to have been closed on March 18th.

A. Yes, sir.

Q. Explain it to me?

A. This is the customers' cotton ledger. That is what this
91 sheet is from. On the sold side shows under date of February 5th, 1908, there was 500 cotton sold.

Q. That is what you took over from A. O. Brown?

A. May cotton at 10.27. He had sold May cotton short with Brown & Co., and they succeeded to that account. He had an obligation to deliver May cotton at 10.27. March 18th, 1908, he bought May cotton at 10.23 making a profit of four points. He relieved himself of liability and made a profit on the deal of $25 which was credited to him on his ledger account. He went from February 5th, short 500 bales of May cotton at 10.27 and he bought it in March at 10.23. I had under my control or supervision customers' ledgers, private ledgers. All the ledgers were under my control. They were handled in a separate department.

Redirect examination:

The cotton account or cotton department was managed and maintained separately from the other, and consequently the cotton account would not appear upon the regular stock account. It would appear as a separate account and so it was in this case.

To the Court: The firm owed plaintiff $25 on that deal after it was closed?

It is conceded that the attorney for the plaintiff made demand of the receivers in bankruptcy of T. A. McIntyre & Co. the defendants herein, for the stocks alleged and described in the complaint prior to the commencement of the action, but no particular demand was made on Mr. White, or John G. or Thomas A. McIntyre, Jr.

92 Counsel for the plaintiff will furnish to the court, after submission to counsel for the defendants, and approved by them tabulated statements showing the market value of each of the stocks and scrip in question at the date of the alleged conversion, showing their actual value on the 23rd of April, 1908, the date of the failure,

and also showing each advancing high price at which the stock was sold from the date of the sale of the respective stocks by the defendants for one year.

Plaintiff offered in evidence order severing action as to the defendant George C. Ryan. Received and marked Plaintiff's Exhibit 7.

Plaintiff rests.

Mr. O'Connell: On behalf of the defendant Edward T. White I move to dismiss the complaint, and for judgment for the defendant, on the following grounds:

First. It is conceded on the records that a discharge in bankruptcy was granted to Edward T. White since the commencement of this action; the claim of the plaintiff in this action was considered in the bankruptcy proceedings; that the plaintiff has not proven a cause of action similar to the state of facts which was before the Appellate Division of the Third Department on the motion of John G. McIntyre to vacate the order of arrest heretofore granted in this action.

Motion denied; exception taken.

93 Mr. Patton: I make the same motion in behalf of John G. McIntyre and also on the additional ground that the plaintiff has failed to prove an action in conversion. I make the same motion on behalf of Thomas A. McIntyre, Jr.

Motion denied; exception taken.

EDWARD T. WHITE, one of the defendants, called as a witness in his own behalf, being duly sworn, testified:

I live at Ridgewood, New Jersey, I am one of the defendants in this action.

Q. Prior to the 5th of February, had you ever met either of the Messrs. Kavanaughs?

Mr. Nussbaum: Plaintiff objects to any testimony tending to show that this defendant did not have any knowledge or did not participate in this matter, on the ground that it is incompetent, irrelevant and immaterial, and that it does not make any difference whether or not he had knowledge, or whether he participated in the conversion. This money went to the credit of the firm, and he had the benefit of it, and the evidence therefore is irrelevant.

The Court: I will hear the evidence and pass upon the point later.

A. I did not know up to the time of the failure that either
94 of the Messrs. Kavanaugh had deposited stocks with T. A. McIntyre & Co. I first learned of it in the bankruptcy proceedings. Neither of the Kavanaughs instructed me to take charge of these stocks from A. O. Brown & Co., nor did I know that the firm had taken over any of these stocks or that they had been disposed of in any way prior to the failure. I gave no instructions to sell or hypothecate any of these stocks and never to my knowledge received any of the proceeds. No demand was ever made upon me by the plaintiff for a return of those stocks.

It is conceded that the witness was discharged in bankruptcy.

I went into business with T. A. McIntyre, Sr., as a clerk 18 years

prior to the failure. My first position was a telegraph operator. After that I became manager of the audit department. And when I was finally taken into partnership I was in charge of the audit department and the leased wires I became a partner in 1905. The last articles of co-partne-ship between me and the other members of the firm were executed in May, 1907. I was a general partner. Beginning May, 1907, and shortly after the execution of these articles of co-partnership the duties that had been assigned to me by Mr. McIntyre, Sr., were taken away from me. I had nothing to do but to come to the office and go home again as a matter of fact. I consulted an attorney in regard to the situation about September, 1907. I was at the office every day after September, 1907,
95 and when I attempted to give an order to the manager of the wire room he would in some way evade me.

Q. Did he fill it?

Objected to on the ground that it is incompetent, inadmissible irrelevant and calling for a conclusion.

Objection overruled. Exception.

A. No, sir, and he gave me no reason for it. I asked him why it was, after I had given an order one day and found it was not filled.

Q. How did things change, how did your status change?

Objected to as calling for a conclusion and as assuming something not proven.

The Court: He can state facts but not conclusions nor what somebody told him.

A. I gave an order to change the course of the leased wire to the chief operator and I found it was not done. The next day I asked him why it was not done and he told me that Mr. Ryan——

Objection sustained. Exception.

My instructions were not followed. I found out why they were not followed from the chief operator.

Q. Did you have a conversation with Mr. T. A. McIntyre, Sr., about your instructions not being followed?

Objected to on the ground that it is incompetent, inadmissible, irrelevant and not binding upon the plaintiff.

Objection over-uled. Exception.

96 A. I did. It resulted in Mr. McIntyre saying he knew nothing about it. That condition continued right along. If I attempted to find out anything in the office I could not.

Q. Did the force follow your instructions from then on?

Objected on the ground that it is incompetent, inadmissible and irrelevant, calling for a conclusion.

Objection over-uled. Exception.

A. They did not. After that condition had continued for some time I consulted an attorney. I think it was in 1907, or 1908, I

consulted you (meaning John J. O'Connell). I never had consulted you before.

Q. How did you come to consult me?

Objected to as incompetent, inadmissible, irrelevant and calling for a conclusion.

Sustained. Exception.

Q. Did you ask me for an opinion?

Objected to on the ground that it is incompetent, inadmissible and irrelevant and calling for a conclusion.

Objection over-uled. Exception.

A. I did.

Q. Did I give you an opinion?

Objected to on the ground that it is incompetent, inadmissible and irrelevant.

Objection over-uled. Exception.

A. Yes, in writing.

97 Defendant offered in evidence, a copy of opinion given to Mr. White in January, 1908.

Received and marked Defendant's Exhibit B.

Mr. Nussbaum: I move to strike out all of the testimony in regard to the cotton transaction, as being incompetent, inadmissible and irrelevant; I also move to strike out the testimony of Mr. White, on the ground that it is incompetent, irrelevant and immaterial, inadmissible and not binding upon the plaintiff.

The Court: I will not strike out the evidence. I will pass upon its materiality when I consider the case.

Exception.

JOHN G. MCINTYRE, one of the defendants, called as a witness in his own behalf, being duly sworn, testified as follows:

I am one of the defendants in this action and was a member of the firm of T. A. McIntyre & Co.

Q. What were your duties as a member of the firm of T. A. McIntyre & Co.

Objected to as incompetent, immaterial, irrelevant and inadmissible.

Objection overruled. Exception.

A. I was the stock exchange board member of the firm. My duties as stock exchange member of the firm were to execute
98 orders on the floor of the New York Stock Exchange in stocks. I was so occupied during the business day from 10 o'clock to 3 week days. and from 10 to 12 on Saturdays. I had no duties to perform in the office. I had nothing to do with keeping the books and gave no instructions about keeping them. I had nothing to do with the making of the loans or with the receipt or delivery of the securities of the firm. I did not know the plaintiff in this suit

and first heard of him when an order of arrest was served on me in my home. I was not acquainted with him before the commencement of this suit. I did not know that he had an account in the office of McIntyre & Co. I knew nothing about this account of Frederick W. Kavanaugh, with McIntyre & Co. prior to the arrest order. I did not know that the firm of McIntyre — had received any stocks on account of Frederick W. Kavanaugh from the firm of A. O. Brown & Co. I did not know that the firm of McIntyre & Co. or any member of that firm parted with the possession of any stocks which they received from A. O. Brown & Co. on account of Frederick W. Kavanaugh. I knew nothing about this account in question prior to the commencement of this suit against me. I never authorized any one to pledge, dispose of, or sell any of the stocks which have been described in plaintiff's complaint herein. In the execution of orders for the purchase and sale of stocks on the stock exchange the communications came to me from the telephone boy on the exchange floor. He would give me a printed order slip to buy or sell, and the amount of the stock. The name of the purchaser or customer
99 for whom I was selling or buying the stock mentioned on the order was not mentioned on the order except in very rare instances. And those rare instances were when a man wanted quick execution and he would write it "Q. R." Mr. Frederick W. Kavanaugh never gave me an order on the stock exchange. I had no knowledge of any kind that any stock belonging to Frederick W. Kananaugh, or in which he had any interest, was being sold or disposed of, or loaned or pledged by the firm, or any member thereof, prior to the commencement of this suit.

Cross-examination:

I was guaranteed a salary of $15,000 a year in the firm of T. A. McIntyre & Co. and an interest in the profits of 15 per cent.

EDWARD T. WHITE, recalled:

To Mr. Nussbaum:

My interest in the firm was $12,000 salary and 8% of the profits up to a certain amount. T. A. McIntyre, Sr., guaranteed the salary.

To Mr. Patton:

Q. Did you draw in excess of your salary as guaranteed from the firm?

Objection. Sustained. Exception.

Q. Did you ever receive, to your kowledge, any portion of the proceeds of the sale of this stock?

Objection. Overruled. Exception.

A. I did not.

100 THOMAS A. MCINTYRE, JR., one of the defendants herein, called as a witness on his own behalf and being duly sworn, testified as follows:

I am one of the defendants and a member of the firm of T. A. McIntyre & Co. My duties as a member of the firm were to execute orders on the cotton exchange. I was employed during business days on the Cotton Exchange during the hours 10 to 3 on week days. I had nothing to do with the purchase and sale of stock or with the loaning or pledging of stock. My sole duties in connection with the firm were in reference to the Cotton Exchange, in executing cotton orders. I first knew the plaintiff in this action some time after the failure; prior to the failure of the firm of T. A. McIntyre & Co., I did not know that the plaintiff had an account with the firm. I had nothing to do with the books of the firm, or with the purchase or sale of stock; or the making of loans, or with the receipt and delivery of stock or securities. Prior to the failure I did not know that any stocks or scrip belonging to the plaintiff or in which he had any interest of any kind had been sold or disposed of by the firm. I never gave any instructions or authorized any one to sell or dispose of any securities or stock or scrip belonging to the plaintiff or in which he had any interest. I had no knowledge of this account or anything in connection with it prior to the failure; nor did I knowingly or in my knowledge receive any portion of the proceeds of the sale of any of the securities in which Frederick W. Kavanaugh had any interest.

101 Cross-examination:

My interest in the firm was $10,000 a year and 8% or 10% of the profits.

Mr. Nussbaum: I move to strike out the evidence of this witness, as being incompetent, inadmissible, improper and immaterial.
Motion denied; exception.

EDWARD T. WHITE, re-called, testified:

Q. Did you ever during the time you were a member of the firm of T. A. McIntyre & Co. have anything to do with the hypothecation of any stocks?

Objected to.
Objection overruled. Exception.

A. I did not. I did not have during that period anything to do with determining as to what stocks should or should not be sold or bought.

Evidence closed.

Mr. O'Connell: I renew the motion on behalf of the defendant, White, to dismiss the complaint, on the same grounds urged before, and for judgment for the defendant White, on the same grounds. Inasmuch as you have denied the motion, or held it over,

and inasmuch as Mr. Nussbaum has asked to submit some proof, and I have to put in the copy of the partnership articles, I ask time to submit a brief.

Mr. Patton: I submit the same motion.

Denied; exception.

102 DEFENDANT WHITE'S EXHIBIT B.

Copy of legal opinion given to the defendant Edward T. White by his counsel Mr. O'Connell.

DEFENDANTS' EXHIBIT C.

Cotton account on books of T. A. McIntyre & Company to account of Frederick W. Kavanaugh.

DEFENDANTS' EXHIBIT D.

Certified Copy, Discharge in Bankruptcy.

No. 10903.

District Court of the United States, Southern District of New York.

Whereas, John G. McIntyre, Thomas A. McIntyre Jr. and Edward T. White in said district, have been duly adjudged bankrupts under the acts of Congress relating to bankruptcy, and appear to have conformed to all the requirements of law in that behalf, it is therefore ordered by this Court that said John G. McIntyre, Thomas A. McIntyre Jr. and Edward T. White individually and as members of the firm of T. A. McIntyre & Co., be discharged from all debts and claims which are made provable by said acts against their and each of their estates, and which existed on the 22nd day of May A. D. 1908, on which day they were adjudicated bankrupts, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

103 Witness the Honorable George C. Holt, Judge of said District Court, and the seal thereof, this 24th day of January, A. D. 1911.

GEO. C. HOLT,
District Judge.

THOMAS ALEXANDER, *Clerk.*

Tabulated Statement Furnished to the Court by Stipulation of Counsel for Plaintiff and Defendants, Showing the Market Value on the Date of the Alleged Conversion and on April 23, 1908, the Date of the Failure; and Advancing High Price at which Stock Sold Within One Year from Date of Alleged Conversion.

Memorandum Showing Each Advancing High Price at which Missouri Pacific Stock was Sold from the Date of Sale for One Year:

Date.		Price.	Date.		Price.
1908			1908.		
March	3	32⅞	May	2	49⅞
	10	33¼		4	50¼
	11	35½		12	51¼
	14	37		14	51¾
	16	40		16	52
	24	40¾		18	59¼
	25	41		19	63¼
	26	41¼		20	64½
	27	43	December	1	65½
April	8	44½		2	67⅛
	9	46⅛		5	67½
			1909.		
	10	46½	January	2	68¼
	28	47½		4	72¼
	29	47⅜		8	72⅞
			February	5	73⅜

104 *Memorandum Showing Each Advancing High Price at which Erie 1 Stock was Sold, from the Date of Sale for One Year:*

Date.		Price.	Date.		Price.
1908			1908.		
March	14	29½	September	8	44¼
	18	30½		9	46
	21	30¾		10	46⅛
	23	31¼	October	7	46½
	24	33½	November	7	47
	26	34½		9	47½
	27	34¾		10	48
	28	35		11	50
April	10	36	December	9	50⅛
May	11	36½		10	50¾
	12	37		29	51¼
	15	38		31	51⅜
			1909.		
	16	38¾	January	2	51½
	18	40¾			
	19	44			

Memorandum Showing Each Advancing High Price at which Cast Iron Pipe Stock was Sold, from Date of Sale, for One Year:

Date.		Price.
1908.		
February	27	19⅜
	29	19¾
March	11	20
	14	20¼
	16	21½
	23	22
	24	23⅛
	25	26
	26	27½
May	18	29
November	7	29¼
	9	30¼
December	12	30⅜
	14	30⅞

Memorandum Showing Each Advancing High Price at at which Missouri, Kansas & Texas Preferred Stock was Sold, from the Date of Sale, for One Year:

Date.		Price.	Date.		Price.
1908.			1908.		
March	7	55	November	7	67½
	26	56		11	68
	30	58		12	69¼
April	9	59		16	69¾
	10	59⅞		17	70
May	2	60½		25	70⅜
	8	60¾		27	71½
	11	61	December	1	71⅝
	12	61¼		3	71⅞
	14	61½		8	72
	16	62⅛		10	72¼
	18	63		16	72½
	19	63⅝		22	75
July	23	63⅞		23	75½
	25	65			
Aug.	12	65⅞			
Sept.	9	66⅞			

106 *Memorandum Showing Each Advancing High Price at which Missouri, Kansas & Texas Stock was Sold, from the Date of Sale, for One Year:*

Date.	Price.	Date.	Price.
1908.		1908.	
March 14	—	September 9	33⅜
23	23½	November 9	33½
24	24¼	11	35⅛
25	24⅝	12	35⅝
27	24¾	13	35¾
28	25¼	14	36⅜
April 24	25¾	25	36⅝
27	26	27	38¼
28	26¾	28	38¾
May 1	27¼	30	38⅝
2	28¼	December 1	39¼
6	28½	10	39¾
9	28¾	15	39⅞
11	29⅞	16	40⅛
18	30	22	42½
19	30⅞	23	43½
		1909.	
20	—	January 16	43⅝
July 20	31½	18	43⅞
23	31¾	19	44⅜
August 1	31⅞	20	44⅝
3	32¼	22	44⅞
4	32⅜		
11	32⅞		
12	33⅛		
13	33¼		

107 *Market Value of Stocks on the Day of the Alleged Conversion.*

	Date.	Price.	Low.
Missouri Pacific.....February	6	42⅛	41⅜
	1908.		
Erie I.....	10	29⅛	28½
#Missouri Pacific Scrip.....	11	39	37⅞
Missouri Kansas & Texas Pfd.	14	53½	53½
#Missouri Pacific Scrip.....	20	32½	29¾
Cast Iron Pipe.....	25	19¼	18¾
Missouri Kansas & Texas...Mch.	18	23	22

Price used is for 1 share of stock.
$250.00 Script = 2½ shares.

Market Value of Stocks on the 23rd April, 1908, the Date of Failure.

		Low.
Missouri Pacific	46⅛	45⅛
Erie 1	35	33¾
Missouri Kansas & Texas	25¼	25
Missouri Kansas & Texas Pfd	56½ asked 56½ bid	54
#Missouri Pacific Scrip	46⅛	45⅛
Cast Iron Pipe	25	24½

#Price used is for 1 share of stock.
$250.00 Script = 2½.

The foregoing case contains all the evidence and testimony offered and given upon the trial of this action.

108 *Opinion.*

Supreme Court, Saratoga County.

Saratoga, Trial Term, November, 1911.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. MCINTYRE and Others, Defendants.

Action for Conversion of Stocks.

Myer Nussbaum, for Plaintiff.
Patton & Patton, for Defendants, John G. McIntyre and Thomas A. McIntyre, Jr.
John J. O'Connell, for Defendant, Edward T. White.

Memorandum.

J. A. KELLOGG, *J.*:

The answering defendants together with Thomas A. McIntyre, now deceased, and one Ryan, named as a defendant in this action but not served, constituted, in the early months of the year 1908, a brokerage firm engaged in business as such in the City of New York under the name of T. A. McIntyre & Co.

One George W. Kavanaugh, a brother of the plaintiff had, at some time prior to the transactions hereinafter detailed, a cotton account and also a stock account with another brokerage firm known as A. O. Brown & Co. Being indebted to his brother the plain-
109 tiff, he transferred to him his interest in this stock account with A. O. Brown & Co.

On the 5th day of February, 1908, the plaintiff was indebted to A. O. Brown & Co., upon this stock account to the amount of $3,853.32, and they held as security therefor, stock in various cor-

porations listed upon the New York Stock Exchange of the value of approximately $25,000, being more than six times the amount of the indebtedness.

On that day, by direction of the plaintiff, the firm of T. A. McIntyre & Co., took over this account, received the certificates of stock, and paid the amount due Brown & Co., thus succeeding to their interests. They also, apparently through a misunderstanding, took over the cotton account, which shortly afterward closed out at a small profit which is still due to the plaintiff or his brother, but which does not in any way affect the questions here to be considered.

Almost immediately thereafter and commencing on the very next day, this firm, without any notice to the plaintiff or demand of any kind upon him, disposed of these various securities placing the avails thereof in their own bank account.

The various stocks had all been disposed of prior to the 18th of March, 1908, and three-fourths in value thereof had been disposed of on or prior to February 14th, or, within nine days after the acquisition of the possession thereof by defendants' firm.

On April 23rd of that year the co-partnership filed a petition in bankruptcy and, during the pendency of this action, the answering defendants obtained their discharge in bankruptcy which fact was thereafter pleaded herein as a defense.

110 At the commencement of this action in May, 1908, an order of arrest was granted. A motion to vacate this order was denied and from the order of denial an appeal was taken to the Appellate Division of this Department, which unanimously affirmed the order appealed from.

The opinion of the court delivered by Mr. Justice Cochrane, reported in 128 App. Div., 722, renders unnecessary any elaborate consideration of the principles of law here involved.

The defendants claimed to be exempt from arrest. Section 9 of the Federal Bankruptcy Law, provides that a bankrupt shall not be exempt from arrest upon civil process upon a claim from which his discharge in bankruptcy would not be a release, and in section 17, in its second subdivision, provides that a discharge in bankruptcy shall not release a bankrupt from liability "for willful and malicious injuries to the person or property of another."

The decision of the Appellate Division was to the effect that an order of arrest was properly issued in this case and is, therefore, conclusive upon this court as a holding that a liability for a conversion which is willful and malicious is not released upon discharge in bankruptcy.

The learned opinion of Mr. Justice Cochrane holds that the term "malicious" as used in the statute includes any wrongful act done intentionally without just cause or excuse, a conclusion at which he arrives after a very elaborate and careful examination of the decisions of the courts and the works of the legal lexicographers.

The allegations of the complaint and the affidavit used on that motion as stated by the learned Justice were to the effect, "that almost immediately after the defendants came into possession of

111 this property they began to sell it to different parties and continued to make such sales from time to time without plaintiff's

knowledge after they had realized more than sufficient to pay the amount due them from plaintiff and applied the avails to their purposes" (page 729).

These facts set forth in the affidavits, upon which the order of arrest was sustained by the Appellate Division, were amply proven upon the trial before this court.

The learned counsel for the defendants urges that the decision in this case in this Department has since been disregarded by the Appellate Division in the First Department in Maxwell vs. Martin, 130 App. Div., 80, and that the United States District Court in the Southern District of New York has expressly refused to follow the decision in the case of In re Ennis & Stoppani, 171 Fed. Rep., 755.

The decision in the Appellate Division, is, of course, authority here, and would be followed in any event.

An examination of the decision in Maxwell vs. Martin shows that it was based upon the authority of decisions made before the amendment to the act in 1903, upon which amendment the decision of our own Appellate Division was, in a measure, founded, and an examination of the case of In re Ennis & Stoppani shows the decision of Judge Hand is based upon a narrow construction which holds that a "conversion" is not an "injury to property." He states, "Injury to person and property means causing damage to the subject matter of the rights not depriving the owner of them." This narrow construction of the term "injury to property" is not in harmony with the accepted definition.

112 Bouvier expressly defines as follows: "Injuries to personal property are the unlawful taking and detention thereof from the owner; and other injuries are some damages affecting the same while in the claimant's possession or "that of a third person, or injuries to his reversionary interests" (see Bouvier's Law Dictionary, Rawle's Revision, Vol. 1, page 1044).

To hold that a person is not injured in his property where some portion of it is actually taken away from him but only when it is all left in his possession reduced in value, does not give effect to the accepted meaning of the phrase in legal parlance.

The definition of the Code of Civil Procedure (section 3343, subdivision 10), is, "an 'injury to property' is an actionable act whereby the estate of another is lessened, other than a personal injury, or the breach of a contract." Although expressly applicable only to that particular statute, this interpretation of the meaning of the term is in full accordance with the generally accepted understanding.

The narrow construction contended for, which would permit the perpetration of such a bare-faced wrong as in the case at bar without any civil liability surviving a discharge in bankruptcy, would be highly improper and should not be struggled for, if any other interpretation of the statute is in any view permissible.

Mr. Justice Peckham, in writing the opinion of the Supreme Court of the United States in Tinker vs. Colwell, 193 U. S., 473, in discussing the meaning of the term "malice" as used in this very section under consideration, wrote, "We are not inclined to place such a

narrow construction upon the language of the exception. We
113 do not think the language used was intended to limit the exception in any such way. It was an honest debtor and not a malicious wrongdoer, that was to be discharged" (page 488).

The conversion of the stocks of the plaintiff by the defendants' firm was in no sense the mistake of an "honest" debtor; it was, most decidedly, the act of a "malicious wrongdoer."

It is urged in behalf of the answering defendants that they knew nothing about the transaction; that it was consummated by some other member of the firm. The proceeds, however, of the conversion went into the firm's bank accounts and were used for its benefit, and all of the co-partners therefore are liable for the act (Chester vs. Dickerson, 54 N. Y., 1; Griswold vs. Haven, 25 N. Y., 595; Matter of Pierson, 19 App. Div., 478; Broadner vs. Strang, 89 N. Y., 299, aff'd, 114 U. S., 555; Castle vs. Bullard, 64 U. S., 172; Levy vs. Abramsohn, 39 Misc., 781; Coman vs. Reese, 21 How. Pr., 114; Sherman vs. Smith, 42 How. Pr., 198).

In Castle vs. Bullard, Justice Clifford laid down the principle as follows:

"Thus, for example, if one of the partners should commit a fraud "in the course of the partnership business, all the partners may be "liable therefor, although they may not all have concurred in the "act. So, if one of the firm of commission merchants should sell "goods consigned to the firm, fraudulently, or should sell goods so "consigned in violation of instruction, all the partners would be "liable. (Citing, Story on Part., sec. 166; Collier on Part. (Am. "ed., 1848), secs. 455 and 457; Nicoll vs. Glennie, 1 Maule & S., "588)."

114 However vigorously certain of the defendants may deny knowledge of the transaction, the act was performed by some member of the firm for the common benefit of all, and undoubtedly sustained for a time the credit of the firm, and postponed for all the partners the evil day of admitted insolvency, with the resultant opportunity for recoupment of losses, which unfortunately proved unavailing. All of the members of the co-partnership are therefore civilly liable.

There is no evidence which indicates, in the slightest degree, that any excusable mistake was made by the defendants in appropriating the securities belonging to the plaintiff. It was a deliberate and intentional act.

Action was shortly brought thereafter and was prosecuted, at least for a time, with reasonable expedition.

The plaintiff is, therefore, entitled to recover the highest prices reached by his respective stocks down to the time of the trial; especially, in view of the fact that such highest prices were in all cases reached during the months of December, 1908, to February, 1909, inclusive.

Up to that time certainly the action was progressed with reasonable celerity, and the rule as stated applies (Romaine vs. Van Allen, 26 N. Y., 309; Markham vs. Joudon, 41 N. Y., 235).

From such prices, however, there should be deducted the amount

due from the plaintiff upon the stocks of $3,853.32. From a statement of prices which has been submitted by agreement of all parties, the following computation is made:

100	Missouri, Kansas & Texas	44⅞	$4,487.50
100	Missouri Pacific	73⅜	7,337.50
2½	Missouri Pacific	73⅜	183.44
200	Cast Iron Pipe	30⅞	6,175.00
115			
100	Erie 1st Preferred	51½	5,150.00
200	Missouri, Kansas & Texas Preferred	75½	15,100.00
1	Erie Scrip	0	0.00
	Total		$38,433.44
	Deduct amount due		3,853.32
	Balance		$34,580.12

The allegation of damage in the complaint is limited to the amount of $30,000.

The plaintiff is not entitled to interest under the rule of damages above indicated, and no application has been made to amend the complaint by increasing the amount stated in the allegation of damage.

Judgment for the amount of $30,000 only, should be entered, and for that amount is directed to be entered, with costs.

Dated November 23rd, 1911.

116 *Stipulation Settling Case.*

It is hereby stipulated that the foregoing case contains all the evidence introduced upon the trial of this action and the same may be settled and ordered to be filed and annexed to the Judgment Roll herein and that the foregoing printed copy be ordered to be filed in the office of the Clerk of this Court in lieu of the engrossed copy required by the rules.

Dated February 10, 1912.

PATTON & PATTON,
Attorneys for Appellants John G. and T. A. McIntyre, Jr.
JOHN J. O'CONNELL,
Attorney for Appellant Edward T. White.
MYER NUSSBAUM,
Attorney for Respondent.

Order Settling Case.

Upon reading and filing the foregoing stipulation providing for a settlement of the case herein and for the filing of the printed record, it is

Ordered that the foregoing case and exceptions which contains

all the evidence introduced on the trial of the action be and the same is hereby settled as the case and exceptions herein and the foregoing printed copy is hereby ordered filed in the office of the Clerk of the Court in lieu of the engrossed copy required by the rules.

Dated February 10, 1912.

JOSEPH A. KELLOGG,
Justice Supreme Court.

117 *Stipulation Waiving Certification.*

Pursuant to section 3301 of the Code of Civil Procedure it is hereby stipulated that the foregoing consists of true and correct copies of the Notices of Appeal, of the Judgment Roll, the case and exceptions as settled and the whole thereof now on file in the office of the Clerk of the County of Saratoga and certification thereof by the Clerk of the County pursuant to Section 1353 of the Code of Civil Procedure is hereby waised.

Dated February 10, 1912.

PATTON & PATTON,
Attorneys for Appellants John G. and T. A. McIntyre, Jr.
JOHN J. O'CONNELL,
Attorney for Appellant Edward T. White.
MYER NUSSBAUM,
Attorney for Respondent.

Order Filing Record in Appellate Division.

Pursuant to Section 1353 of the Code of Civil Procedure it is

Ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division, of the Supreme Court in the Third Department.

Dated February 10, 1912.

JOSEPH A. KELLOGG, *J. S. C.*

118 *Order of Affirmance.*

At a Term of the Appellate Division in and for the Third Department, Held at the Court's Rooms, Corner of Chapel and State Streets, in the City of Albany, New York, Commencing on the 5th Day of March, 1912.

Present:

Hon. Walter Lloyd Smith, Presiding Justice.
Hon. John M. Kellogg,
Hon. James W. Houghton,
Hon. George F. Lyon,
Hon. James A. Betts,
Justices.

FREDERICK W. KAVANAUGH, Plaintiff-Respondent,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE. and Thomas McIntyre, Jr., Defendants; John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, Appellants.

The appeal in the above entitled action having been heard at this term, it is hereby, on motion of Myer Nussbaum, Esq., attorney for the plaintiff-respondent, after hearing Robert H. Patton, Esq., attorney for the defendants-appellants Thomas A. McIntyre, Jr., and John G. McIntyre, and John J. O'Connell, Esq., attorney for the defendant appellant Edward T. White,

Ordered that the judgment entered herein in the office of
119 the Clerk of the County of Saratoga on the 18th day of December, 1911, for the sum of Thirty thousand five hundred eighty and 18/100 ($30,580.18) Dollars be, and the same is hereby unanimously and wholly affirmed with costs of said appeal to the plaintiff respondent herein.

[SEAL.] JOSEPH H. HOLLANDS, *Clerk.*

A Copy.
JOSEPH H. HOLLANDS, *Clerk.*

Judgment of Appellate Division, Third Department.

Supreme Court, Appellate Division, Third Department.

FREDERICK W. KAVANAUGH, Plaintiff-Respondent,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE. and Thomas A. McIntyre, Jr., Defendants; John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, Appellants.

Judgment of the 21st Day of May, 1912.

The appeal taken by the defendants John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White in the above entitled action

having been heard at a Term of the Appellate Division of the Supreme Court, held in and for the Third Judicial Department, commencing on the 5th day of March, 1912, and an order of said Appellate Division having been made and entered affirming the
120 judgment of the Supreme Court entered in said action on the 18th day of December, 1911, in the County Clerk's office of Saratoga County, with costs of said appeal to the respondent,

Now, on motion of Myer Nussbaum attorney for the respondent, it is hereby adjudged that the said judgment appealed from be and the same is hereby wholly unanimously affirmed, and that the respondent Frederick W. Kavanaugh recover from and against the appellants John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, the sum of One Hundred Two and 25/100 Dollars, costs of said appeal.

Entered May 27th, 1912, 8 a. m.

GEO. I. YOST,
Dep. Clerk.

Office of the County Clerk.

STATE OF NEW YORK,
County of Saratoga, ss:

I have compared the foregoing copy with an instrument filed in this office on the 27th day of May, 1912, and certify the same to be a correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto subscribed my name and affixed the official seal of the County of Saratoga this 12 day of July, 1912.

[Seal of Saratoga County.]

JOHN F. HENNESSY, *Clerk.*

121 *Notice of Appeal of John G. McIntyre and Thomas A. McIntyre, Jr., to Court of Appeals.*

Supreme Court, County of Saratoga.

FREDERICK W. KAVANAUGH, Plaintiff,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD T. WHITE, and THOMAS A. MCINTYRE, Jr., Defendants.

Please take notice that the defendants John G. McIntyre and Thomas A. McIntyre, Jr., appeal to the Court of Appeals of the State of New York, from the judgment of the Appellate Division of the Supreme Court for the Third Department entered in this action in the office of the Clerk of the County of Saratoga on the 27th day of May, 1912, which adjudged and decreed that the plaintiff Frederick W. Kavanaugh recover from and against the defendants

John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White the sum of One hundred and two 25/100 Dollars costs of appeal, and affirming the final judgment entered in this action on the 18th day of December, 1911, in the office of the Clerk of Saratoga County for the sum of Thirty thousand five hundred and eighty 18/100 Dollars. And the said defendants John G. McIntyre and
122–124 Thomas A. McIntyre, Jr., appeal from each and every part of the said judgment of the Appellate Division of the Supreme Court, Third Department, as well as from the whole thereof.

Dated New York, June 22, 1912.

PATTON & PATTON,
Attorneys for Defendants,
John G. McIntyre & Thomas A. McIntyre, Jr.

Office & Post Office Address, 40 Wall Street, Borough of Manhattan, New York City.

To the Clerk of the County of Saratoga; Myer Nussbaum, Esq., Attorney for Plaintiff.

Filed June 27, 1912.

Office of the County Clerk.

STATE OF NEW YORK,
County of Saratoga, ss:

I have compared the foregoing copy with an instrument filed in this office on the 27th day of May, 1912, and certify the same to be a correct transcript therefrom and of the whole of said original.

In testimony whereof I have subscribed my name and affixed the official seal of the County of Saratoga, this 12 day of July, 1912.

[Seal of Saratoga County.]

JOHN F. HENNESSY, *Clerk.*

* * * * * * *

125 & 126 *Clerk's Certificate.*

STATE OF NEW YORK,
County of Saratoga, ss:

I, John F. Hennessy, Clerk of the said County, and Clerk of the Supreme Court of said State for the said County do certify that I have compared the preceding with the original copy Appellate Division order, judgment and notices of appeal, Frederick W. Kavanaugh vs. Thomas A. McIntyre et al. on file in my office and that the same are correct transcripts therefrom and the whole of such originals.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal this 12 day of July, 1912.

[Seal of Saratoga County.]

JOHN F. HENNESSY, *Clerk.*

127 *Stipulation Waiving Certification.*

Pursuant to Section 3301 of the Code of Civil Procedure it is hereby stipulated and agreed by and between the attorneys for the appellants and respondent that the foregoing papers are true and complete copies of the judgment roll, notices of appeal, case and exceptions and stipulation of the order of the Appellate Division of the Third Department and the judgment entered thereon and the notices of appeal to the Court of Appeals filed in the office of the Clerk of the County of Saratoga and certification thereof by said Clerk is hereby waived.

Dated July 10, 1912.

MYER NUSSBAUM,
Attorney for Plaintiff-Respondent.
PATTON & PATTON,
Attorneys for Defendants-Appellants
John G. McIntyre and Thomas A. McIntyre, Jr.
JOHN J. O'CONNELL,
Attorney for Defendant-Appellant
Edward T. White.

128 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 3rd day of February, in the year of our Lord one thousand nine hundred and fourteen, before the Judges of said Court.

Witness, The Hon. Willard Bartlett, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur, Feb'y 4th, 1914.

FREDERICK W. KAVANAUGH, Respondent,
ag'st
THOMAS A. MCINTYRE, Impld. with JOHN G. MCINTYRE and Others,
Appellants.

Be it remembered, That on the 12th day of July in the year of our Lord one thousand nine hundred and twelve, John G. McIntyre and others, the appellants in this action, came here into the Court of Appeals, by Patton & Patton and John J. O'Connell, their attorneys, and filed in the said Court, Notices of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Frederick W. Kavanaugh, the respondent in said action, afterwards appeared in said Court of Appeals by Myer Nussbaum, his attorney.

Which said Notices of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause

argued by Mr. Robert H. Patton of counsel for appellants McIntyre and having been submitted by counsel for the appellant White and argued by Mr. Myer Nussbaum of counsel for the respondent,
129 and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things Affirmed. And it was further ordered and adjudged that the respondent recover against the appellants costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things Affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, Feb'y 4th, 1914.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[L. S.] R. M. BARBER, *Clerk.*

130 Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff-Respondent,
against
THOMAS A. MCINTYRE, JOHN G. MCINTYRE, EDWARD J. WHITE, and Thomas A. McIntyre, Jr., Defendants; John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, Appellants.

The defendants John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, heretofore and on the 27th day of May, 1912, entered in the above entitled action, affirming the final judgment entered in this action on the 18th day of December, 1911, in the office of the Clerk of the County of Saratoga, and said Court of Appeals having heard this cause argued and having ordered and

adjudged that the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department be affirmed with costs, and the remittitur from said Court of Appeals having been duly filed in this Court and an order duly entered thereon, making the judgment of the Court of Appeals the judgment of this Court and directing judgment to be entered herein as hereinafter adjudged with costs, and the plaintiff's costs having been taxed at the sum hereinafter stated, now, on motion of Myer Nussbaum, Esq., attorney for plaintiff, it is

Ordered and adjudged that the judgment hereinbefore mentioned entered herein on the 27th day of May, 1912, be and the same is hereby affirmed, and it is further

131 Ordered and adjudged that the plaintiff recover from and against John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, defendants, the sum of one hundred and seventy five 60/100 dollars, the amount of his costs herein as taxed and that he have execution against said defendants therefor.

GEO. I. YOST,
Dep. Clerk.

Entered Feb. 20, 1914, 12.17 p. m.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Saratoga, at Ballston Spa, New York, on the 13th day of February, 1914.

Present: Hon. Henry V. Borst, Justice.

FREDERICK W. KAVANAUGH, Plaintiff-Respondent,
against
THOMAS A. McINTYRE, JOHN G. McINTYRE, EDWARD T. WHITE, and Thomas A. McIntyre, Jr., Defendants; John G. McIntyre, Thomas A. McIntyre, Jr., and Edward E. White, Appellants.

The defendants John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, heretofore and on the 27th day of May, 1912 entered in the above entitled action affirming the final judgment entered in this action on the 18th day of December, 1911, in the office of the Clerk of the County of Saratoga, and said

132 Court of Appeals having heard this cause argued and having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court appealed from in this action be affirmed and judgment rendered for the plaintiff with costs, now, upon filing the remittitur from said Court of Appeals, and upon motion of Myer Nussbaum, Esq., attorney for said plaintiff respondent, it is

Ordered that said judgment of the Court of Appeals be and the same is hereby made the judgment of this Court; and that the aforesaid judgment entered herein on the 27th day of May, 1912 be and the same is hereby affirmed and that judgment of this Court be en-

tered herein affirming said judgment with costs of said appeal against the defendants to be taxed.

HENRY V. BORST, *J. S. C.*

Enter.

Entered Feb. 20, 1914. Geo. I. Yost, Dep. Clerk.

133 STATE OF NEW YORK,
County of Saratoga:

Clerk's Office of the Supreme Court of the State of New York for the County of Saratoga.

I, John F. Hennessy, Clerk of the County of Saratoga and of the Supreme Court of the State of New York for the said County of Saratoga, by virtue of the annexed writ of error which was served upon me on the 12th day of March, 1915, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 132 inclusive contains a true and complete transcript of the record and proceedings had in said court in the suit mentioned in said writ of error, as the same remains of record and on file in my office, and that annexed hereto is the petition for the said writ of error, the citation to the writ of error with proof of service of the same and the said writ of error served upon me.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at my office in the County of Saratoga on the 20th day of March, 1915.

[Seal Saratoga County.]

JOHN F. HENNESSY,
County Clerk.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Mr. 20, '15. J. F. H.]

134 Supreme Court, County of Saratoga.

FREDERICK W. KAVANAUGH, Plaintiff,
against
JOHN G. MCINTYRE, THOMAS A. MCINTYRE, JR., and EDWARD T. WHITE, Defendants.

DEAR SIRS: Please to take notice that Mr. John G. McIntyre, one of the above named defendants is about to apply to a Justice of the Supreme Court of the United States for a writ of error to review the order and judgment of the Court of Appeals which affirmed the judgment of the Appellate Division and which affirmed the judgment of the Special Term herein; and that he hereby demands and

requests and notifies you to join in the application for such writ of error.

Dated, New York, February 20, 1915.

JOHN G. McINTYRE,
By ROBERT H. PATTON,
His Attorney.

To Thomas A. McIntyre, Jr., Esq., and to Edward T. White, Esq.

Service of the above notice by delivery to me of a copy thereof this 20 day of February, 1915, is hereby admitted.

EDWARD T. WHITE.

I hereby admit service of the within paper this 23rd day of February, 1915, by delivery to me personally a copy thereof.

THOMAS A. McINTYRE, JR.

135 Supreme Court, Saratoga County.

FREDERICK W. KAVANAUGH, Plaintiff,
against
JOHN G. McINTYRE, THOMAS A. McINTYRE, JR., and EDWARD T. WHITE, Defendants.

CITY OF NEW YORK,
County of New York, ss:

Leon E. McElroy, being duly sworn, deposes and says that he served the within Notice personally on Edward T. White, one of the above named defendants on the 20th day of February, 1915, by leaving with him a copy thereof; and on Thomas A. McIntyre, Jr., one of the above named defendants, personally, on the 23rd day of February, 1915, by delivering to him a copy thereof.

LEON E. McELROY.

Sworn to before me, this 3rd day of March, 1915.

CHARLES S. MARTIN,
Notary Public, New York County, No. 2571,
New York Register No. 6312.

136 Supreme Court, County of Saratoga.

FREDERICK W. KAVANAUGH, Plaintiff,
against
JOHN G. McINTYRE, THOMAS A. McINTYRE, JR., and EDWARD T. WHITE, Defendants.

CITY OF NEW YORK,
County of New York, ss:

John G. McIntyre, being first duly sworn on oath deposes and says, that he has caused notice of his intention to apply to a Justice of

the Supreme Court of the United States for a Writ of Error to review the judgment of the Court of Appeals herein, to be served on his co-defendants, Edward T. White and Thomas A. McIntyre, Jr., and that they each neglect and decline to join with him in said application for said Writ of Error.

JOHN G. McINTYRE.

Subscribed and sworn to before me this 2nd day of March, 1915.
[L. S.] CHARLES S. MARTIN,
Notary Public, New York County, No. 2571;
New York Register No. 6312.

137 [Endorsed:] Supreme Court, Saratoga County. Frederick W. Kavanaugh, Plaintiff, against John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, Defendants. Copy. Notice of Application for Writ of Error to the Supreme Court of the United States, and affidavit of service & affidavit of John G. McIntyre. Patton and Patton, Attorneys for —— ——, No. 40 Wall Street, Borough of Manhattan, New York City. Filed Mar. 12, 1915, 3:58 p. m.

138 In the Supreme Court of the United States.

FREDERICK W. KAVANAUGH, Defendant in Error,
against
JOHN G. McINTYRE, Plaintiff in Error; THOMAS A. McINTYRE, JR., and EDWARD T. WHITE, Defendants in Error.

To the Honorable Edward D. White, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States and to the Honorable Supreme Court of the United States:

The petition of John G. McIntyre, respectfully shows:

1. That he resides in the City, County and State of New York and that he is a citizen of the United States. That heretofore and on or about the 18th day of May, 1908, an action was commenced in the Supreme Court of the State of New York, for the County of Saratoga, by Frederick W. Kavanaugh against your petitioner and Thomas A. McIntyre, Edward T. White, George C. Ryan and Thomas A. McIntyre, Jr., That the amended complaint in said action set forth that the defendants were co-partners in business, doing business under the firm name of T. A. McIntyre & Co., That it was further alleged that on or about the 5th day of February, 1908, the plaintiff was the owner of certain stock and scrip therein described, which was then in the possession of the firm of A. O. Brown & Co., and that there was due on said stock and scrip to the said firm, the sum of $3,853.32; and that on the last named date, the plaintiff instructed the defendants under the firm name of T. A. McIntyre & Co., to take over the stocks and scrip of the firm of A. O.

Brown & Co., and to advance thereon said sum so due thereon;
139 and that said firm of T. A. McIntyre & Co., advanced said sum and took over said stock and scrip from A. O. Brown & Co., that the defendants never delivered to the plaintiff the stocks or scrip or any part thereof.

II. Said complaint further alleged that without order or authority, the said firm of T. A. McIntyre & Co., wrongfully, wilfully and maliciously disposed of said stock and scrip and injured the property of the plaintiff and converted the same to their own use without the consent of the plaintiff; and that subsequently the firm of T. A. McIntyre & Co., and the defendants individually were adjudicated bankrupts in the District Court of the United States for the Southern District of New York; and that the plaintiff tendered the amount due on said stock and scrip to the receivers in bankruptcy and demanded the same, which was refused; and further alleged that by the wrong doing and conversion of said stock and scrip, the plaintiff was damaged in the sum of $30,000, for which he demanded judgment.

III. The defendants, John G. McIntyre, Edward T. White and Thomas A. McIntyre, Jr., answered said complaint by separate answers. Your petitioner, John G. McIntyre in his answer denied any knowledge or information as to the sale or disposal of said stock by the said firm of T. A. McIntyre & Co. He denied any conversion of the same on his part; denied that he had unlawfully, wrongfully, wilfully or maliciously disposed of the said property or injured or converted the same. He denied that he had been guilty of any wrong doing or conversion of said stock or scrip. He alleged that the firm of T. A. McIntyre & Co., were at the times mentioned in the complaint, engaged in the City of New York as brokers, buying and selling stocks on commission on the New York Stock Exchange, that the transactions of said firm with plaintiff were as such brokers.

That petitioner was the floor broker of the firm and his duties
140 were in the execution of orders on the floor of the Exchange.

That he had no personal knowledge of any of the transactions of the firm with the plaintiff. He alleged and set up in his answer his discharge in bankruptcy which was obtained subsequently to the commencement of the suit, as a release and bar to the plaintiff's cause of action against him.

IV. The defendant Thomas A. McIntyre died before the trial of the action and the action was severed as to the defendant, George C. Ryan.

V. That subsequently the issues on said pleadings came on for trial on or about December 18th, 1911 before Justice Kellogg of the Supreme Court of the State of New York at Special Term, without a jury. Your petitioner was sworn upon the trial of the action and testified that his duties in said firm were to execute orders for the purchase and sale of stocks on the floor of the Stock Exchange; that he had no duties to perform in the office of said firm. That he had nothing to do with the keeping of the books of the firm or with the receipt or delivery of securities; that prior to the beginning of the suit, he did not know the plaintiff and that he knew nothing

about the account of the plaintiff or that said firm had received any stocks of the plaintiff or that they ever parted with the possession of said stock; that he never authorized any one to sell, pledge, dispose or sell any stocks described in the complaint or that the same was being sold or disposed of by said firm. There was no evidence on the trial to show which member of the firm disposed of said stocks, or to show that petitioner had any knowledge thereof. The Court in its findings found that on February 5th, 1908, the defendants were engaged in business as brokers under the firm name of T. A. McIntyre & Co. That the plaintiff's brother had a cotton and also a stock account with A. O. Brown & Co., and that he transferred to the plaintiff his interest in the stock account and that the plaintiff on the 5th of February, 1908, being the owner of said stock account was indebted to the firm of A. O. Brown & Co., to the amount of $3,853.32 and said A. O. Brown & Co., held as security therefor the scrip and stock mentioned in the complaint; that thereafter, T. A. McIntyre & Co., took over the account, received the stock and paid to A. O. Brown & Co., the amount owing thereon. That also immediately after taking over said stock, T. A. McIntyre & Co., without notice to the plaintiff and without his consent sold and disposed of the stock and scrip and deposited the proceeds in their bank account. That discharges in bankruptcy were granted to the defendants, John G. McIntyre, T. A. McIntyre, Jr., and Edward T. White. That the Court found as a conclusion of law, "that above named defendants, together with the other members of the firm of T. A. McIntyre & Co., in disposing of said stocks and misappropriating the proceeds and avails thereof, without notice to or demand upon the plaintiff and without his authority, knowledge or consent committed a wilful and malicious injury to the property of the plaintiff and that under sub-division Two, section 17 of the Bankruptcy Laws of the United States, the debt involved therein is an undischargeable debt and survives the discharge in bankruptcy of said defendants aforesaid." To which findings of law, the defendant and his co-defendants duly excepted.

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VI. That thereupon your petitioner requested the Court to find that the discharge in bankruptcy granted your petitioner released and discharged him individually and as a member of said firm from any and all obligations which he had at any time incurred to the plaintiff, because of the matters and things which are the subject of said action. That the Court refused so to find, to which he duly excepted. That he requested the Court to find that the sale and disposal of said stock by the said firm of T. A. McIntyre & Co., did not constitute a wrongful and malicious injury to the property of the plaintiff within the meaning of section 17 of the Bankruptcy Act of the United States of 1898 and of the amendments thereto. But the Court refused to so find to which he duly excepted. That he requested the Court to find that the plaintiff was not entitled to the return of the identical certificates of stocks which the firm of T. A. McIntyre & Co., received from A. O. Brown & Co., if the firm had at all times a sufficient number of shares of like stock, although bearing different numbers. That the plaintiff having failed to prove

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that there was any stocks similar in account and quality of those received from A. O. Brown & Co., and there being no proof of any demand having been made by the firm or members thereof for the return of said stock, the plaintiff failed to prove a conversion of said stock. But the Court refused to so find, to which he duly excepted. He also excepted in the following language "to so much of the conclusion of law numbered first in said decision as finds and decides that under sub-division Two, of section 17 of the Bankruptcy Laws of the United States, the debt involved therein is not a dischargeable debt and survives the discharge in bankruptcy of the defendant John G. McIntyre and Thomas A. McIntyre, Jr., on the ground that the Court failed to give due and proper force and effect to the discharge in bankruptcy granted to the defendants, John G. McIntyre and Thomas A. McIntyre. Jr., by the District Court of the United States for the Southern District of New York under and in pursuance of the Act of Congress as approved, July 1, 1898, entitled 'An Act To Establish A Uniform System Of Bankruptcy Throughout The United States, And The Amendments Thereto', and thereby denied to these defendants the right, privilege and immunity under said Acts of Congress". The Court entered judgment against the
143 defendants for the sum of $30,380.18 and costs, to which your petitioner duly filed his exception.

VII. That subsequently the defendants appealed from the said judgment of the Supreme Court to the Appellate Division of the Supreme Court for the Third Department. That said appeal came up for argument before the said Appellate Division and your petitioner and his co-defendants through their counsel, duly argued that said judgment should be reversed for the reason that the said discharges in bankruptcy were a bar to the recovery of any judgment against said defendants and for the reason that the Court below erred in finding that under sub-division 2 of Section 17 of the Bankruptcy Laws of the United States, the debt involved therein is not a dischargeable debt and survives a discharge in bankruptcy of the defendants and on the ground that the Court below failed to give due proper force and effect to the discharge in bankruptcy, granted to the defendants, and thereby denied to the defendants the right, privilege and immunity under said Act of Congress. And it was especially argued on behalf of your petitioner on said argument, both in the Appellate Division and in the Court of Appeals, that inasmuch as it appeared from the proof that your petitioner had no knowledge or information of the sale of said stocks, and the same were disposed of without his knowledge or consent, that the petitioner had not committed any wilful or malicious injury to the property of the plaintiff within the meaning of sub-division 2, section 17 of the Bankruptcy Act of 1898 and the amendments thereto.

VIII. That thereafter and on or about the 5th of March, 1912, an order was entered in the office of the Clerk of the said Appellate Division, which affirmed said judgment. And a certified copy of said order with the original papers on said appeal, were entered in
144 the office of the Clerk of Saratoga County, in the State of New York. And, subsequently a judgment for costs taxed upon

said appeal was entered in the office of the Clerk of the County of Saratoga which adjudged "that the judgment appealed from, be and the same is hereby wholly unanimously affirmed and that the respondent, Frederick W. Kavanaugh, recover from and against the appellants, John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, the sum of $102.25, costs of said appeal".

IX. That thereafter an appeal was taken by the said defendant from the judgment of affirmance of the Appellant Division to the Court of Appeals of the State of New York, being the highest Court of Law or Equity in the said State of New York, where it was again urged upon the argument thereof by the counsel for the defendants, the same grounds of exception to said judgment as had been urged in the Court below and in the Appellate Division. That subsequently, the Court of Appeals affirmed the said judgment and a remittitur from the said Court of Appeals was filed in the office of the Clerk of Saratoga County and thereupon upon the 20th day of February, 1914, final judgment was rendered against the defendants, affirming said judgment and taxing against the defendants the sum of $175. That under the practice existing in the Courts of the State of New York, the errors relied upon are not contained in formal assignments of errors, but in such a case as this are based upon exceptions taken to the findings of fact and conclusions of law made by the trial justice and to the refusal by him to make certain requested findings, which exceptions appear in the record of this case.

That by the final judgment of the said Supreme Court of the State of New York entered upon said decision of said Court of Appeals, manifest error has happened to the great damage of your petitioner, all of which appears in the record and final order
145 of said Court of Appeals and the final judgment of said Supreme Court of the State of New York.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York and the judges thereof, to the end that the complete record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected, and the said judgment properly amended so as to provide that the discharge in Bankruptcy so granted to your petitioner by the District Court of the United States for the Southern District of New York, may be recognized and enforced and be held and decreed to be a release of the debts and causes or actions alleged or set up in said complaint of said suit and a bar to the recovery of any judgment thereon and that said judgment, as to your petitioner be set aside and said suit dismissed and full effect be given to said discharge in Bankruptcy according to the rights guaranteed to your petitioner by the Act of Congress to establish a uniform system of Bankruptcy throughout the United States approved July 1st, 1898, and the amendments thereto.

And your petitioner will ever pray.

JOHN McINTYRE.

Let the writ issue as prayed.
Washington, D. C., Feb. 25, 1915.

CHARLES E. HUGHES,
Associate Justice of Supreme Court of United States.

146 STATE OF NEW YORK,
County of New York, ss:

John G. McIntyre, being duly sworn, deposes and says, that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOHN G. McINTYRE.

Sworn to before me this 24th day of February, 1915.

[Seal Charles S. Martin, Notary Public, New York County.]

CHARLES S. MARTIN,
Notary Public, New York County, No. 2571;
New York Register No. 6312.

147 [Endorsed:] In the Supreme Court of the United States. Frederick W. Kavanaugh, Defendant in Error, against John G. McIntyre, Plaintiff in Error; Thomas A. McIntyre, Jr., and Edward T. White, Defendants in Error. Petition for a writ of Error. Robert H. Patton, Attorney for Petitioner, No. 40 Wall Street, Borough of Manhattan, New York City.

148 The Supreme Court of the United States.

FREDERICK W. KAVANAUGH, Defendant in Error,
against
JOHN G. McINTYRE, Plaintiff in Error, et al.

And now comes John G. McIntyre, the plaintiff in error and files this assignment of errors and respectfully submits that in the record proceedings and decision of the Court of Appeals of the State of New York and of the Appellate Division of the Third Department and in the final judgment of the Supreme Court of the State of New York in the above entitled matter there is manifest error in this;

I. The Court of Appeals of the State of New York, erred in affirming the judgment of the Appellate Division of the Third Department and in refusing to reverse the judgment of the Supreme Court of the State of New York for the County of Saratoga, and in holding that the cause of action alleged and set forth in the plaintiff's complaint was not released and barred by the defendant's discharge

in bankruptcy, and in refusing to give effect to the discharge in bankruptcy granted to the defendant by the District Court of the United States for the Southern District of New York set up in defendant's answer and thereby denying to the plaintiff in error, a right privilege and immunity granted under the laws of the United States, to wit:—Under an Act of Congress, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States" approved July 1898, and the amendments of said statute.

II. The Appellate Division of the Third Department of the State of New York and the Supreme Court of the State of New York for Saratoga County, each erred in holding that the
149 cause of action alleged in the plaintiff's complaint was not released and barred by the defendant's discharge in bankruptcy and in refusing to give effect to the discharge in bankruptcy granted to the defendant by the District Court of the United States for the Southern District of New York, set up in defendant's answer and thereby denying to the plaintiff in error a right, privilege and immunity granted to him by the said Statutes of the United States.

III. The Court of Appeals of the State of New York, erred in refusing to sustain the exception of the defendant to the finding of the said Supreme Court, which found that the defendant committed a wilful and malicious injury to the property of the plaintiff and that under sub-division Two, section Seventeen of the Bankruptcy Laws of the United States, the debt involved therein was an undischargeable debt and survived the discharge in bankruptcy.

IV. The Court of Appeals erred in refusing to sustain the exception of the defendant to the refusal of the said Supreme Court to find that the sale and disposition of the plaintiff's stock by the firm of T. A. McIntyre & Co., did not constitute a wilful and malicious injury to the property of the plaintiff within the meaning of section Seventeen of the Bankruptcy Act of the United States of 1898 and of the amendments thereto.

V. The Court of Appeals erred in refusing to sustain the defendant's exception to the refusal of said Supreme Court to find that the plaintiff was not entitled to a return of the identical certificates of stock which the firm of T. A. McIntyre & Co., received from A. O. Brown & Co., if the firm had on hand at all times the sufficient number of shares of stock of like kind, quality and amount, although bearing different certificate numbers.

150 VI. The Appellate Division of the Third Department and the Supreme Court of the State of New York for the County of Saratoga, each also erred in refusing to sustain the said exceptions.

VII. The Supreme Court of the State of New York erred in rendering judgment against the defendant.

VIII. The Appellate Division of the Supreme Court of the State of New York for the Third Department erred in affirming the judgment of the Supreme Court of the State of New York for the County of Saratoga.

IX. The Court of Appeals of the State of New York erred in affirming the judgment of the said Appellate Division.

ROBERT H. PATTON,
Attorney for Plaintiff in Error.

No. 40 Wall Street, Borough of Manhattan, City of New York, State of New York.

Service of a Copy of the within Assignment of Errors is hereby admitted this 10 day of March, 1915.

MYER NUSSBAUM,
Attorney for Defendant in Error, Frederick Kavanaugh.

151 [Endorsed:] The Supreme Court of the United States. Frederick W. Kavanaugh, Defendant in Error, against John G. McIntyre, Plaintiff in Error, et al. Assignment of Errors. Robert H. Patton, Attorney for Plaintiff in Error, No. 40 Wall Street, Borough of Manhattan, City of New York, State of New York.

152 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court upon a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frederick W. Kavanaugh, plaintiff, and John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or

153 wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said John G. McIntyre, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifth day of March, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

154 [Endorsed:] Supreme Court of the United States. October Term, 1914. John G. McIntyre, Pl'ff in Error, vs. Frederick W. Kavanaugh. Writ of Error. Received Mar. 12, 1915. Geo. I. Yost, Dep. Clerk.

Service of a copy of the within Writ of Error is hereby admitted this 10" day of March, 1915.

MYER NUSSBAUM,
Attorney for Defendant in Error, Frederick W. Kavanaugh.

155 UNITED STATES OF AMERICA, *ss:*

To Frederick W. Kavanaugh, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York, wherein John G. McIntyre is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this fifth day of March, in the year of our Lord one thousand nine hundred and fifteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

156 Service of a copy of the within citation is hereby admitted this 10" day of March, 1915.

MYER NUSSBAUM,
Attorney for Defendant in Error, Frederick W. Kavanaugh.

157 Know all men by these presents, That John G. McIntyre, of the City of New York, State of New York and the National Surety Company, having an office at No. 115 Broadway, Borough of Manhattan, City of New York, as surety are held and firmly bound unto Frederick W. Kavanaugh, in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said Frederick W. Kavanaugh, his attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally by these presents.

Sealed with our seals and dated this 27th day of February, 1915.

Whereas, lately at a Supreme Court in the State of New York in a suit depending in said Court between Frederick W. Kavanaugh, plaintiff, and John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White, defendants, a final judgment was rendered against the said defendants on February 20, 1914, and the said John G. McIntyre having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Frederick W. Kavanaugh, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington within thirty (30) days from the date thereof.

Now, the condition of the above obligation is such that if the said John G. McIntyre, shall prosecute said Writ of Error to effect and answer all costs if he fail to make his plea good then the above obligation to be void, else to remain in full force and virtue.

JOHN G. McINTYRE. [L. S.] [SEAL.]
[CORPORATE SEAL.] NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice President.

Attest:
E. M. McCARTHY,
Resident Ass't Secretary.

Signed, sealed and delivered in the presence of:
——— ———.

Approved by:
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

158 STATE OF NEW YORK,
County of New York, ss:

On this 27th day of February, 1915, before me personally appeared Wm. A. Thompson, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that

the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent, pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York. And said Wm. A. Thompson further said that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said E. M. McCarthy subscribed to the said instrument is in the genuine handwriting of the said E. M. McCarthy and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

H. E. EMMETT,
Notary Public, &c.

Copy of By-law.

Be it remembered: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

Article XIII.

SECTION 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "seal" or the letters "l. s." opposite the signature of such Attorneys-in-Fact, as the case may be.

STATE OF NEW YORK,
County of New York, ss:

I, E. M. McCarthy, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and the whole of said original By-Law.

Given under my hand and the seal of the Company, in the County of New York, this 27th day of February, 1915.

E. M. McCARTHY,
Resident Assistant Secretary.

159 To the Honorable the Supreme Court of the United States:

JOHN G. McINTYRE, Plaintiff in Error,
against
FREDERICK W. KAVANAUGH, Defendant in Error.

And now comes John G. McIntyre, the plaintiff in error and prays for a reversal of the judgment of the Court of Appeals of the State of New York in the action brought by Frederick W. Kavanaugh against John G. McIntyre, Thomas A. McIntyre, Jr., and Edward T. White and which was entered in the office of the Clerk of the County of Saratoga on or about February 20th, 1914; and for a reversal of the order therein of the Appellate Division of the Third Department, entered on or about the 5th day of March, 1912, and the judgment of the Supreme Court of the State of New York entered thereon; and for the reversal of the judgment in said action of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Saratoga on or about December 18, 1911.

ROBERT H. PATTON,
Attorney for Plaintiff in Error, John G. McIntyre.

No. 40 Wall Street, Borough of Manhattan, City of New York.

160 FREDERICK W. KAVANAUGH, Respondent,
v.
THOMAS A. McINTYRE et al., Defendants, and JOHN G. McINTYRE et al., Appellants.

CUDDEBACK, *J.*:

Section 17 of the Bankruptcy Act, as amended in 1903, provides that a discharge in bankruptcy shall release a bankrupt from all his provable debts, except, among others, such debts as "are liabilities * * * for willful and malicious injuries to the * * * property of another."

The question in this case, of course, is whether the liability of the defendants asserted by the plaintiff is for willful and malicious injuries to the plaintiff's property.

In Hilliard on Torts (Vol. 1 (3rd ed.), p. 464) it is said: "Injuries to property are in themselves of great variety; being committed with or without force, immediately or consequentially, by misfeasance or nonfeasance, by direct invasion of another's possession, or by an unauthorized use of one's own property, causing damage to another. With reference to the injuries themselves, they include disseisin, trespass, nuisance, conversion, waste, fraud and negligence; and with reference to the remedies by which such injuries are redressed the actions of ejectment, trespass, trover, case and waste."

In Northern Railway of France v. Chas. Carpentier, Felicite Dubud et al. (13 How. Pr. 222 (1856) an order of arrest was issued against the defendant Felicite Dubud, a woman. In her behalf it was claimed she was not liable to arrest under a section of the Code which provided that no female shall be arrested in a civil action except for willful injury to person, character or property. The facts of the case were that the plaintiff owned certain railway shares with coupons attached, and that the defendants Carpentier and Grellet, officers of the company, with the assistance of the defendant Felicite Dubud and others, abstracted the shares and coupons, converted the same into money, and escaped with the money
161 to this country. The court held, in the first place, that these acts on the part of the defendants constituted an injury to the property, and, in the second place, that such injury was willful, and Felicite Dubud was, therefore, liable to arrest. The court said: "The stock and coupons have been destroyed as such; they have been converted into money, and that is, beyond all question, an injury to the plaintiff's property."

This case was followed in Duncan v. Katen (6 Hun., 1 1875), where it appeared that the defendant, a woman, had induced a clerk in the employ of the plaintiffs to wrongfully take from them gold certificates to the amount of $20,000, and give the same to her, and that she had converted and concealed the certificates. It was held that the defendant was liable to arrest in a civil action. The court said that the facts charged showed a willful injury to property, and continued as follows: "It is claimed that these acts are not a willful injury to the plaintiff's property, because it is not shown that she (the defendant) had done some physical injury to the paper on which the gold certificates are printed and written. This is refining too technically for the benefit of crime." The case of Duncan v. Katen was affirmed in this court, without opinion (64 N. Y. 625).

The Bankruptcy Act, in defining the liabilities for injuries to property not released by the discharge, describes them not only as willful but as malicious injuries. There can be no doubt but that if our Code had forbidden the arrest of a woman in any action except for willful and malicious injuries to person, character or property, the court in each of the cases cited would have found that the acts constituted malicious as well as willful injuries.

Tinker v. Colwell (193 U. S. 473, 487) was a proceeding
162 under the Code of Civil Procedure to cancel a judgment obtained against the plaintiff in error for criminal *conversation*

on the ground that the petitioner had been discharged from his debts under the Bankruptcy Act. It was argued on behalf of the petitioner that criminal *conversation* did not constitute a malicious injury to the husband's rights and property. The court considered at length the meaning of the word "malicious" as used in the Bankruptcy Act and said in denying the application to discharge the judgment: "We think a willful dis-regard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception" of section 17.

The firm of T. A. McIntyre & Co., received the stock and scrip on February 5, 1908, under circumstances which gave them no right without the knowledge and consent of the plaintiff to sell the securities and retain the avails thereof. Yet, being at that time in financial straits, they began the very next day to sell the stock and scrip, and within a brief period all had been disposed of. It is very significant that the defendants against whom the judgment was rendered went on the witness stand but made no attempt to justify or excuse the acts of the firm. These facts show that the conversion of the stock and scrip was not merely technical nor committed in the assertion of a m-staken claim to the property. It was a wrongful act done intentionally without just cause or excuse, and constituted willful and malicious injury to the plaintiff's property as those words are used in section 17 of the Bankruptcy Law. (Tinker v. Colwell, supra.)

Counsel for the defendants argue that the construction her- given renders section 17 tautological, and that is true to some extent.

Prior to the amendment of 1903, subdivision 2 of section 17
163 excepted in general terms from the effect of a discharge in bankruptcy judgments in actions for willful and malicious injuries to the property of another, while subdivision 4 excepted specifically debts created by the bankrupts' frauds while acting in a trust capacity. The difference in the main between these subdivisions was that number 2 applied only to debts reduced to judgment, while number 4 applied to the debts particularly enumerated, whether reduced to judgment or not. This distinction was struck out by the amendment of 1903, and some overlapping must occur. Some cases will fall within both subdivisions. But that is not a reason for limiting the words "wilful and malicious injury to property" contained in subdivision 2. The classification made originally by section 17 has been somewhat disarranged but the meaning of the section is plain enough.

It is also argued on behalf of the defendants that they did not actually participate in the injury done to the plaintiff's property, and that the wrongful acts were committed by other members of the firm. The individual members of a copartnership are civilly liable for torts of which they have no knowledge, committed by any member of the firm in the course of the partnership business. (Matter of Peck, 206 N. Y. 55; Castle v. Bullard, 64 U. S. 172.) The case, is therefore, precisely within the words of section

17, subdivision 2, of the Bankruptcy Act, defining debts which are not released by the discharge in bankruptcy. The words are "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * are liabilities * * * for willful and malicious injuries to the person or property of another." If the defendants are civilly liable for the acts of other members of the firm, which amount to a willful and malicious injury to the property of the plaintiff, that ends the argument. They are not released by the discharge in bankruptcy, no matter whether they participated in the acts which caused the injury or not.

164 Strang v. Bradner (114 U. S. 555) is directly in point.

In Crawford v. Burke (195 U. S. 176), a case upon which the defendants rely, it was held that a broker carrying stocks on margin who sells the same and does not pay over the proceeds to his principal, is not indebted in a fiduciary capacity within the Bankruptcy Act, and consequently the defendant was relieved from liability by his discharge. To the same effect is Tindle v. Birkett (183 N. Y. 267; 205 U. S. 183).

These decisions were based on subdivision 4 of section 17 and had reference to discharges granted prior to the amendment of 1903. They have no application to the case at bar which falls within the provisions of subdivision 2 of section 17, as amended in that year, and does not involve the question whether the defendants were acting as officers or in a fiduciary capacity. There has been no authoritative holding contrary to the views herein expressed since the amendment of 1903.

My conclusion is that the determination of the Appellate Division was correct, and that the judgment appealed from should be affirmed with costs.

Willard Bartlett, Ch. J., Werner, Chase, Collin, Hogan and Miller, JJ., concur.

Judgment affirmed.

165 In the Supreme Court of the United States.

JOHN G. McINTYRE, Plaintiff in Error,
against
FREDERICK W. KAVANAUGH, Defendant in Error.

The plaintiff in error makes this statement under Rule Ten (10) of the Rules of the United States Supreme Court, of the errors on which he intends to rely herein and of the parts of the record which he thinks necessary for the consideration thereof;

First. The plaintiff in error will rely upon all the grounds of error set forth and mentioned in his assignment of errors attached to and forming a part of the record herein.

Second. The plaintiff in error designates the following portions of the record as necessary for the consideration thereof, to be printed by the Clerk of this Court, as the printed record herein, to wit;

The Notice of Appeal of John G. McIntyre and Thomas A. McIntyre, Jr., to the Appellate Division of the Supreme Court of the

State of New York, Third Department on page Four (4) of the original record.

The summons in the Supreme Court of Saratoga County being on page Seven (7) of the record.

The Amended Complaint of the plaintiff, Frederick W. Kavanaugh in the Supreme Court, Saratoga County, pages Fourteen (14), Fifteen (15), Sixteen (16), Seventeen (17) and Eighteen (18) of the record and verification and signatures thereto.

166 The Answer of John G. McIntyre to the Amended Complaint of the plaintiff in said action, pages 19, 20, 21, 22, 23 and verification and Exhibit- 24 and 25.

The findings of the Supreme Court, Saratoga County pages 39, 40, 41, 42, 43 and 44 of said record and signature of Judge thereto.

The judgment of the Supreme Court, Saratoga County, pages 45 and 46 of said record and signature of Clerk thereto.

The requests to find by the defendants, John G. McIntyre and Thomas A. McIntyre, Jr., pages 48, 49, 50, 51, 52, 53 and 54 of said record and signature of Judge thereto.

The Exceptions of John G. McIntyre and Thomas A. McIntyre, Jr., pages 60, 61, 62, 63 and 64 of said record and signatures thereto.

The Case and Exhibits, pages 67 to 107, inclusive, of said record.

The opinion by Judge Kellogg rendered on the trial in the said action, pages 108 to 115 inclusive, of said record.

The Stipulation of the attorneys settling the case and the order of Judge Kellogg settling the case and signatures thereto, page 116 of said record.

The Stipulation waiving certification of the record signed by the attorneys. The order filing the record in the Appellate Division and signature of Judge Kellogg thereto, page 117 of the record.

The Order of Affirmance of the Appellate Division of the Third Department in the State of New York and Clerk's signature thereto. The judgment of the Appellate Division of the Third Department and Clerk's signature, pages 118, 119 and 120 of said record.

The Notice of Appeal of John G. McIntyre and Thomas A. McIntyre, Jr., to the Court of Appeals in said action, page- 121 and 122 of said record and signatures of attorneys thereto.

167 The certificate of John F. Hennessy, Clerk of Saratoga County on page 125 of said record.

The Stipulation of the attorneys waiving certification page 127 of said record and signatures thereto.

The Remittitur from the Court of Appeals.

The Judgment of Affirmance entered in the Supreme Court Saratoga County on the Remittitur and the Order of Affirmance of the Supreme Court of said Saratoga County entered on the Remittitur, being pages from 128 to 132 of said record and Clerk's signature thereto.

A copy of the Notice of John G. McIntyre to Edward T. White and Thomas A. McIntyre, Jr., of his intention to apply for Writ of Error to the Supreme Court of the United States and request to

Subject Index.

List of Cases.

Supreme Court of the United States.

OCTOBER TERM, 1915.

JOHN G. McINTYRE,
Plaintiff-in-Error,

against

FREDERICK W. KAVANAUGH,
Defendant-in-Error.

No. 408.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

Statement.

This case comes before this Court by writ of error to the Supreme Court of New York, after a remittitur from the Court of Appeals of that State, being the highest Court in which a decision could be had, was entered affirming a judgment of the Supreme Court of New York, Saratoga County, for the sum of $30,000 and costs rendered December 18, 1911, in favor of Frederick W. Kavanaugh, plaintiff, against John G. McIntyre, Edward T. White and Thomas A. McIntyre, Jr. The remittitur of the Court of Appeals and the judg-

ment on the remittitur was entered February 20, 1914. The action was commenced May 18, 1908, against Thomas A. McIntyre, Edward T. White, John G. McIntyre, George C. Ryan and Thomas A. McIntyre, Jr., composing the firm of T. A. McIntyre & Co., to recover for the alleged willful conversion of certain stocks of the plaintiff by said firm of T. A. McIntyre & Co., composed of said defendants (Amended Complaint, Rec., pp. 2, 4, fols. 14, 17). Prior to the trial of the cause, Thomas A. McIntyre had died and the cause of action was severed against George C. Ryan, judgment being obtained against the other three members of the firm. The petition for the writ of error to this Court is filed by John G. McIntyre, one of the defendants, the other defendants not joining therein after notice of the application for the writ. The writ of error was allowed by the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States on March 5, 1915 (Record, fol. 153). On May 28, 1908, the firm of T. A. McIntyre & Co. and the individual members thereof were adjudicated bankrupts in the District Court of the United States for the Southern District of New York. Subsequently the defendants, John G. McIntyre, Edward T. White and Thomas A. McIntyre, Jr., received their discharges in bankruptcy from said United States District Court. The defendants above named answered the plaintiff's amended complaint and set up in defense to the action, their discharges in bankruptcy (fols. 22, 25). The case was tried in the Supreme Court of Saratoga County, New York, before Justice Kellogg of said Court without a jury. The defendants offered in evidence and set up their discharges in bankruptcy as a defense to the plaintiff's cause of action and as a release thereof and a bar thereto (fol. 103), and

moved to dismiss the complaint which was denied and the defendants excepted (fols. 92, 93, 101). The defendant, John G. McIntyre requested the Court to find that his discharge in bankruptcy released him from all liability on account of said cause of action; and was a bar to said suit, but the Court refused to so find, to which the defendant excepted (fols. 53, 54, 63). The Court found as a conclusion of law that the firm of T. A. McIntyre & Co. in disposing of said stocks without the knowledge or consent of the plaintiff and misappropriating the proceeds thereof committed wilful and malicious injury to the property of the plaintiff, and that under Subdivision 2, Section 17 of the Bankruptcy Law of the United States, the debt involved therein was an undischargeable debt and survives the discharge in bankruptcy of said defendants (fol. 44). The defendant, John G. McIntyre excepted to said finding (fol. 61). The Court thereupon entered judgment against said defendants to which the defendant, John G. McIntyre excepted; and took an appeal therefrom to the Appellate Division of the Third Department (fol. 4), which affirmed said judgment (fol. 118) without an opinion. The defendants appealed from said judgment and order of affirmance of the Appellate Division to the Court of Appeals of the State of New York (fol. 121). The Court of Appeals affirmed the judgment and the order of affirmance of the Appellate Division (fol. 129). The defendant, John G. McIntyre, urged his exceptions to the findings of the Court below, and the refusal of said Court to give effect to his discharge in bankruptcy, both in his brief before the Appellate Division and before the Court of Appeals. See opinion of Court of Appeals (fols. 160, 163, 164).

The firm of T. A. McIntyre & Co. up to the time of their failure on April 24, 1908, was engaged in business in the City of New York as brokers, doing business on the stock, cotton and grain exchanges in said City. On or about February 1, 1908, George W. Kavanaugh, the brother of the plaintiff had a certain stock and cotton account with the firm of A. O. Brown & Co. He transferred his interest in the stock account to the plaintiff, his brother. There was due to A. O. Brown & Co. the sum of $3,853.33 on the stocks. McIntyre & Co. advanced to A. O. Brown & Co. the said sum of $3,853.33 and took over from A. O. Brown & Co. both the stock and cotton account. The cotton account was closed out in March, 1908 (fol. 91), and the stock certificates were disposed of by McIntyre & Co. at different dates between February 7 and March 18, 1908 (fols. 84-86), without the plaintiff's order or knowledge. McIntyre & Co. failed on April 24, 1908, and were adjudicated bankrupts. The plaintiff tendered to the receivers in bankruptcy of McIntyre & Co. the amount due on his stocks and demanded his stocks, which was refused by the Receivers. No demand of the stocks was made on McIntyre & Co. or its members. The plaintiff filed his proof of claim for the value of his stock in the bankruptcy proceedings. The defendant John G. McIntyre, plaintiff-in-error, was not a party to the conversion and had no knowledge of the disposition of the stock.

The questions presented are:

1. Was the plaintiff's (defendant-in-error) claim against the defendant (plaintiff-in-error) barred by the latter's discharge in bankruptcy?

2. Is an action for the conversion of stock or appropriation of proceeds, a wilful and malicious in-

jury to property within the exceptions mentioned in Paragraph 2, Section 17 of the Bankruptcy Act of 1898, as amended in 1903?

3. If such a conversion by some member of the firm did come within the exception mentioned, and did constitute a wilful and malicious injury to property, was the plaintiff-in-error, who had no knowledge of the conversion and did not participate therein, barred from setting up his discharge in bankruptcy as a defense to said action?

Specification of Errors.

The plaintiff-in-error's assignment of errors may be briefly summarized as follows:

1. The Supreme Court of the State of New York erred in finding that the cause of action alleged in the plaintiff's complaint was not released and barred by the defendant's discharge in bankruptcy and in refusing to give effect to the discharge in bankruptcy granted by the District Court of the United States for the Southern District of New York, set up in defendant's answer and in not sustaining the defendant's exception to such finding. The Supreme Court of the Third Department and the Court of Appeals each erred in not sustaining defendant's exceptions to the findings of the Supreme Court and in affirming the judgment against the defendants.

2. The Supreme Court erred in finding that the defendant committed a wilful and malicious injury to the property of the plaintiff and that under Subdivision 2, Section 17 of the Bankruptcy Law of the United States, the debt involved in said action was an undischargeable debt and survived the discharge in bankruptcy.

3. Said Supreme Court erred in refusing to find that the sale and disposition of the plaintiff's stock by the firm of T. A. McIntyre & Co. did not constitute a wilful and malicious injury to the property of the plaintiff within the meaning of the Seventeenth Section of the Bankruptcy Act of the United States of 1898 and the amendments thereto.

4. Said Supreme Court erred in refusing to find that the plaintiff was not entitled to a return of the identical certificates of stock which the firm of T. A. McIntyre & Co. received from A. O. Brown & Co. if the firm had on hand at all times a sufficient number of shares of stock of like kind, quality and amount, although bearing different certificate numbers

5. The Supreme Court erred in rendering judgment against the defendant; and the Court of Appeals and the Appellate Division of the Third Department of the Supreme Court each erred in affirming said judgment and in not sustaining the defendant's exceptions to the findings of said Supreme Court and its refusal to find as requested.

I.

The evidence in the case showed no more than a conversion of property; it did not establish a case of wilful and malicious injury to property within the meaning of Section 17a of the Bankruptcy Act of 1898 as amended.

George W. Kavanaugh, the brother of the defendant-in-error, purchased through A. O. Brown & Co. a firm of brokers in the City of New York, some time prior to April, 1907, certain shares of stock and scrip which he had partially paid for and on which there was due then $3,853.32 ad-

vanced by said firm to complete said purchase (Record, fol. 79). He had also about said time sold short through said firm 500 bales of cotton for May delivery on which he had put up no margin. The conditions under which Brown & Co. held the stocks were not clearly stated by the defendant-in-error (fol. 71), but apparently the stocks were held by Brown & Co. as security for the money owing on them, and also as security on the cotton account. In April, 1907, George W. Kavanaugh, disposed to his brother, the defendant-in-error, his interest in the stocks in Brown & Company's hands. On the 4th of February, 1908, the defendant-in-error instructed the firm of T. A. McIntyre & Co. to take over from A. O. Brown & Co. the stock and pay them what was owing them. The firm of T. A. McIntyre & Co. accordingly, on the 5th of February, 1908, took over the stocks and account from A. O. Brown & Co., paying A. O. Brown & Co., the $3,-853.32 which was due them, and also took over the cotton account, receiving from A. O. Brown & Co. certain stock certificates for 100 shares of Missouri Pacific, 100 shares of Erie 1st; 100 shares of M. K. T. common, 100 shares of M. K. T. preferred, 200 Cast Iron Pipe, and 4 shares Missouri Scrip. There was some dispute as to whether the defendant-in-error instructed T. A. McIntyre & Co. to take over the cotton account or not; the Court below in its *fifth* finding of fact (fol. 41) holding it did not affect the stock transaction, and the Court was apparently in doubt by said finding as to whom the cotton account belonged. The Court holding that there was a profit thereon which was due to the plaintiff or his brother. In the letter of McIntyre & Co. to the defendant-in-error, offered in evidence (fol. 88) they notified him of having taken over his cotton account. He did not deny receiving the

letter but stated he did not remember receiving it (Record, p. 20, fol. 71). Shortly after the stock certificates were received they were all disposed of by McIntyre & Co. Why these stocks were sold or the explanation for the sale does not appear. Whether they were regarded as being put up on a marginal account, and all held as security on a marginal account for the stocks and cotton, and were sold to realize a margin on the stock and cotton account; or whether they were sold by some error or mistake; or whether because there were other stocks on hand of like quality, amount and the identity of the certificate numbers was deemed immaterial, does not appear. Thomas A. McIntyre, the senior member of the firm was dead at the time of the trial and as the other members of the firm testified, they had no knowledge of the transaction. It was probable that he was the only member who could have given any explanation of the transaction.

It is noticeable that the plaintiff, Frederick W. Kavanaugh testified in reference to the certificates mentioned in his complaint and taken over from A. O. Brown & Co. (fol. 74):

> "Q. Do you claim $250 of Missouri Pacific scrip? A. Yes, sir.
>
> "Q. Represented by certificates A41254 and A41252? A. Whatever the list shows there.
>
> "Q. You claim to have been the owner of certificates A41254 and A41252? A. I do not remember anything about the numbers of the certificates.
>
> "Q. You do not claim that you are the owner of those particular certificates, but of so many shares? A. So many shares.
>
> "Q. But not referring to any particular certificates? A. No, sir.

"Q. Is that same thing true in reference to all the shares of stock, does the same answer apply to the stock as to the scrip? A. Certainly."

The allegations of the complaint as to ownership are, "That the plaintiff was the owner of the following stock and scrip, 100 shares of Missouri Pacific represented by 4 certificates for 25 shares each A41015, A38741, A28770, A35974 * * * 250, Missouri Pacific scrip represented in certificates A41254, A41252 for $200 each." It appears from the findings (fol. 41) McIntyre & Co. received two certificates, A41252 and A41254, for two shares each and gave back to A. O. Brown & Co. certificate 39488 for one (1) share and certificate 926 for ½ share, and that Kavanaugh was only entitled to $250 interest in the two certificates representing $400.

II.

There could be no doubt that under the Bankruptcy Law as it existed in 1898 prior to the amendment of 1903 the cause of action herein would have been released by a discharge in bankruptcy.

That the cause of action herein is on a provable debt in bankruptcy, that it is not a debt created in a fiduciary capacity and would have been released under the United States Bankruptcy Law as it existed in 1898 (30 U. S. Statutes at Large, 550) is held established by the cases of Crawford *v.* Burke, 195 U. S., 176; Tindle *v.* Burkett, 183 N. Y., 267; Dunbar *v.* Dunbar, 190 U. S., 340; Kavanaugh *v.* McIntyre, 128 App. Div., 722; Hennequin *v.* Clews, 111 U. S., 676.

The doubt whether the debt is discharged under the present law arises from the phraseology of the amendment of 1903 (32 U. S. Statutes at Large,

798), which changed the word "judgment" into "liability" in Paragraph (2) of Section 17a.

This doubt was accentuated in the minds of the Court in Kavanaugh *v.* McIntyre, 128 Appellate Division, 722, by the construction given to the words "wilfull and malicious injuries" in Paragraph (2) of Section 17a in the case of Tinker *v.* Colwell, 193 U. S., 473. The question was declared by the Appellate Division, however, to be a novel one and not free from doubt. So far as counsel is aware the question has not yet been passed upon in this Court.

III.

An action for a conversion of stocks or appropriation of the proceeds thereof is not an action on a liability for a wilful and malicious injury to person or property within the meaning of (2), Section 17a of the Bankruptcy Law of the United States as amended.

While it is true, perhaps, in a broad sense that depriving a person of his property is an injury to property; the question is not what is the meaning of the words in their widest application; but what did Congress mean by the use of the terms in the Bankruptcy Act? While the opinion of the Court of Appeals in this case is eminently logical in reaching the conclusion that a conversion of property is a "liability for a wilful and malicious injury to property," and comes within the language of the Bankruptcy Act; with great deference to that opinion, plaintiff-in-error nevertheless contends that if a full examination and comparison were made of the former bankruptcy acts, and examination of the purpose and manner in which the amendment of 1903 was made, it would appear

that it could not have been the intention of Congress to include a case of conversion within the meaning of those terms.

In the first place the construction given to the clause of the Act, by the Court of Appeals, renders the whole section tautological and inharmonious. As so construed it covers the cases specially mentioned in (2) liability for obtaining property by false pretenses, liability for obtaining property by false representations, liability for seduction, liability for criminal conversation; it covers all the cases specifically in (4) debts created by fraud, embezzlement, misappropriation, defalcation, while acting as an officer or in any fiduciary capacity; and it renders nugatory the words, "while acting as an officer or in a fiduciary capacity." This is something more than an overlapping.

Was it the intention of Congress by widening the class, "wilful and malicious injuries to property," to wipe out the species "defalcations and misappropriations while acting as an officer or in a fiduciary capacity," and thereby include all defalcations, all misappropriations. The distinction between defalcations or misappropriations by persons not acting as officers or in a fiduciary capacity and of defalcations and misappropriations by persons so acting in such capacity is one that has prevailed in every bankruptcy Act since 1841. It would seem that Congress would not have attempted to wipe out the distinction in so clumsy a manner, by an amendment, which still retained the clause, Paragraph (4), which contains the distinction.

The meaning of the amendment of 1903 becomes more apparent on examining the former Bankruptcy Acts.

The Bankruptcy Act of 1841 provided, Section 1:

> "All persons whatsoever * * * owing debts which shall not have been created in consequence of a defalcation as a public officer or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, * * * who shall apply to the proper court as hereinafter mentioned for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements shall be deemed bankrupts," &c.

The Bankruptcy Act of 1867, Section 33 provided:

> "That no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary capacity, shall be discharged under this act; but the debt may be proved and the dividend thereon shall be a payment on account of said debt."

The Act of 1898 prior to the amendment of 1903, provided (Section 17a):

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (2) are judgments in actions for frauds or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge, of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

The Act of 1898 was amended by the Act of 1903 so that it now reads as amended:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (2) are liabilities for obtain-

ing property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance with the name of the creditor, if known to the bankrupt, unless such creditor had notice of actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

It will be noticed that the amendment of 1903 strikes out of (2), Section 17a of the Act of 1898 the words "frauds or." It would appear that the amendment as originally introduced in the House of Representatives (Congress Record, June 17, 1902, Vol. 35, p. 6940) retained the word "frauds" in (2) 17a. Mr. Ray speaking for the bill said: "The next amendment provides that liabilities for fraud, etc., as described in the act shall not be released by the discharge. As the law now is those liabilities must have been reduced to judgments, or else the bankrupt is discharged. This amendment is in the interest of justice and honest dealing." And at page 6942 he said, "The substitution of liabilities for judgments in actions makes the clause broader, now claims created by fraud but not reduced to judgment are discharged, neither the claim nor the judgment should be." But when this amendment reached the Senate, the words "frauds or" were stricken out. Is not this change by the Senate of the phraseology of the original amendment most significant?

When the case of Crawford *v.* Burke, 195 U. S., 176, which was an action for conversion which took place prior to 1903 came before this Court, it was held, reversing the Supreme Court of Illinois, that

the words "fraud, embezzlement, or misappropriation in (4), Section 17, included only those of an officer or person acting in a fiduciary capacity, and that the words while "acting as an officer or in any fiduciary capacity" referred to all the preceding words of "fraud, embezzlement, misappropriation or defalcation." That to construe the meaning of the word "fraud" otherwise would be to render meaningless the words "judgment for frauds in Paragraph (2) of the section. That the change of phraseology in the Act of 1898 from that of 1867 meant a change of meaning.

We may therefore consider Congress as reasoning as follows: Under the Act of 1867 no debts created by fraud were released by a discharge in bankruptcy, whether created by a person acting in a fiduciary capacity or not. Under the Act of 1898 as construed in Crawford *v.* Burke, 195 U. S., 176, debts created by fraud were released by a discharge in bankruptcy, unless they were reduced to judgment, or were debts created by a person acting as an officer or in a fiduciary capacity. An amendment is now introduced striking out of Paragraph 2, Section 17, the word "judgments," before the words "in actions for frauds" and inserting in place thereof the word "liabilities." The effect of this amendment, if adopted, will be to destroy the meaning altogether of Paragraph (4) covering cases of frauds by the public officers, or person acting in a fiduciary capacity. But we do not wish to destroy these distinctions in the Act of 1898. We will wipe out certain distinctions in the Act between certain classes of fraud reduced to judgment, and others not reduced to judgment, and between liabilities for wilful and malicious injuries to property and judgments for such injuries. We do this by striking out the word "judgment" and substituting the word "liability." But we will also strike out the

word "fraud" in Paragraph (2), so that there shall be only certain specific species of fraud which shall be excepted from a discharge in bankruptcy, and these shall be:

(2) Obtaining property by false pretenses, or false representations; (4) debts created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity.

Is this not the most sensible interpretation? For suppose that it were the intention of Congress which is conceivable, of course, to strike out the word "frauds," because it regarded the words "wilful and malicious injuries to person or property" as covering all frauds, and to thereby avoid the use of redundant language, why would it not also have stricken out the particular frauds enumerated, of "obtaining property by false pretenses or false representations?"

It seems more plausible to maintain that by striking out the general word "frauds" in (2) Section 17a, and leaving in the section the particular frauds enumerated, Congress intended that only the particular and enumerated frauds should be excepted from a release by a discharge in bankruptcy.

If this view of the intention of Congress as disclosed in the Bankruptcy Act be correct, it will be unnecessary to determine, as was attempted by the lower Court, whether the words wilful and malicious injury to property includes conversion of property or not. Even if the language is broad enough to cover all cases of fraud on familiar principles of construction, the Court will restrict the words "wilful and malicious injury" so as not to include conversion, if such should appear to be the intention of Congress.

It is stated in Sutherland on Statutory Construction, Volume 2, Section 422:

> "It is a principle of statutory construction everywhere recognized and acted upon not only with respect to penal statutes, but to those affecting only civil rights and duties that where words particularly designating specific acts or things are followed by and associated with words of general import comprehensively designating acts or things the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might have if standing alone, but as related to the words of more definite and particular meaning with which they are associated."

It is unnecessary to cite many of the numerous cases that may there be found on the subject as it is a matter of elementary construction.

It is also stated in Sutherland on Statutory Construction, Section 470:

> "Amendments made or proposed and defeated may also throw light on the construction of the act as finally passed and may properly be taken into consideration."

State *v.* Lancashire Ins. Co., 66 Ark., 466.
Barnard *v.* Gall, 43 La. An., 959.
State *v.* Hostiter, 137 Mo., 636.
Small *v.* Small, 129 Pa. St., 366.
Standard U. C. Co. *v.* Attorney General, 46 N. J. E., 270.

In the case of Barnard *v.* Gall, 43 La. An., 959, it was held that where a license act pending in the Legislature was amended by striking out the words "saw mills" such fact was held to clearly show that they were not intended to be included in the general language of the Act.

IV.

Since the amendment of the Bankruptcy Act of 1903 a number of the Courts, State and Federal, have held that a liability for the conversion of stock was released by a discharge in bankruptcy and did not fall within the exception of a wilful and malicious injury to property.

In all of the following cases the question arose after the passage of the Amendment of 1903.

The case of *In re* Wenham, 153 Fed. Rep., 910, was an action commenced in 1906 against the bankrupt by the Canadian Pacific Railway in which it was alleged that the bankrupt as an agent for said railway had converted to his own use over $50,000, the proceeds of passenger tickets sold by him. The bankrupt was arrested in the action after an adjudication in bankruptcy against him and a writ of *habeas corpus* was sued out in the United States District Court, on the ground that the bankrupt was exempt from arrest under Section 9a of the Bankruptcy Act which provides that a bankrupt shall be exempt from arrest upon civil process when issued from a State Court upon a debt or claim from which his discharge in bankruptcy will be a release. The Court, Holt, Judge, held that the debt was such a one as would be released by his discharge in bankruptcy. The Court said:

> "The question in this case is not whether the bankrupt has been guilty of reprehensible or fraudulent or criminal acts, the question is whether he is exempt from arrest under Section 9a of the Bankruptcy Act. That section provides as follows: 'A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or dis-

obedience of its lawful orders; (2) when issued from a State Court having jurisdiction and served within such State upon a debt or claim from which his discharge in bankruptcy would not be a release.' In the first place, in my opinion, the petitioner is exempt from arrest in this case on the ground that he has not been arrested by a civil process from a court of bankruptcy or from a State Court. He is held under process issued from the United States Circuit Court. In the next place, in my opinion, he is not held upon a debt or claim from which his discharge in bankruptcy would not be a release."

In re Adler, 152 Fed. Rep., 422, was a petition in the United States Circuit Court of Appeals, Second Circuit, to review an order of the District Court denying a motion to vacate an order of the Court dated May 1st, 1906, staying the prosecution of an action against said bankrupt for the conversion and misapplication to his own use of certain monies received by him as factor and agent. It was held that the debt was a dischargeable one in bankruptcy and that the prosecution of the action should be stayed. The Court seems to have conceived that the only question was whether or not the indebtedness alleged in the complaint was created by bankrupt's fraud, embezzlement, misapplication or defalcation while acting in a fiduciary capacity. The Court seems to have taken it for granted that the case was not one for a wilful or malicious injury to person or property.

In Maxwell *v.* Martin, 130 App. Div., 80, the Appellate Division of the First Department held on an appeal from a judgment rendered on the 29th day of May, 1907, on a complaint setting forth a cause of action for false and fraudulent representations of the defendant, in reliance upon which the plaintiff delivered to the defendant certain shares of stock which the defendant appro-

priated and converted to his own use; that the claim for conversion was barred by a discharge in bankruptcy. The Court said:

> "Section 17, Subdivision 2, of the Bankruptcy Law (30 U. S. Stat. at Large, 550, as Amended by 32 *id.*, 798, Section 5), provides that 'a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations or for willful and malicious injuries to the person or property of another.' The amendment substituted the word 'liabilities' in place of 'judgments in actions for frauds,' etc.; but so far as the question here involved is concerned, the amendment is immaterial, and the great weight of authority, whatever may be said to the contrary, is to the effect that a claim for the conversion of personal property, possession of which was not obtained by false representations or pretenses, is released by his discharge in bankruptcy" (Crawford *v.* Burke, 195 U. S., 176; *In re* Wenham, 153 Fed. Rep., 910; *In re* Adler, 152 *id.*, 422; Fechter *v.* Postel, 114 App. Div., 776; Lewis *v.* Shaw, 122 *id.*, 96).

Fechter *v.* Postel, 114 App. Div., 776: This was an appeal to the Appellate Division of the Second Department from an order of the Supreme Court on the 5th of January, 1906, cancelling and discharging a judgment. The judgment was obtained in an action for conversion. After the obtaining of the judgment the defendant was adjudicated a bankrupt and received his discharge in bankruptcy. The Court affirmed the order below cancelling the judgment, on the ground that the claim for conversion was discharged by the discharge in bankruutcy.

Lewis *v.* Shaw, 122 App. Div., 96: This was an appeal from a judgment of the Supreme Court,

dated May 14th, 1906, dismissing a complaint. The action was brought for the conversion of $150 in money. The answer set up the discharge in bankruptcy of the defendant. The Appellate Division of the Fourth Department affirmed the order dismissing the complaint and held that the action being a claim for conversion was barred by the discharge.

Barrett *v.* Prince, 16 Am. Bkcy. Rep., 64; U. S. Circuit Court of Appeals, Seventh Circuit 1906): Action for conversion of stock in February, 1905. Held that the defendant, who had been adjudged a bankrupt, was not liable to arrest in the action because the debt was dischargeable in bankruptcy.

Matter of Floyd Crawford & Co., 15 Am. Bkcy. Rep., 277: Motion to vacate a stay of proceedings in the suit of Seaver *v.* Floyd Crawford & Co. It appeared that a firm of Ennis & Stoppani was carrying for the plaintiff in 1902 certain stocks on margin. The plaintiff delivered to such firm a certificate for 10 shares of Ontario & Western, which stood in her name and was all paid for, to be held as collateral, not to be sold. The plaintiff transferred her account to Floyd Crawford & Co. upon the same conditions as to margin. But it does not appear that any member of said last named firm was notified of said condition as to the collateral. Floyd Crawford & Co. paid Ennis & Stoppani on the transfer of the account $791, receiving 10 shares Atchison, which was held on margin, and the certificate of the 10 shares of Ontario & Western. Floyd Crawford & Co. subsequently sold the 10 shares of Atchison on plaintiff's order, realizing $697 and leaving a balance due them of $95. Subsequently, on April 19th, Floyd Crawford & Co. pledged the certificate for 10 shares of Ontario & Western with other stocks

for a personal loan of $3,000. On April 30th the plaintiff paid up the balance of $95 due Floyd Crawford & Co. Subsequently, on May 9th, the pledgee sold out the stock in the loan. Floyd Crawford & Co. failing two days thereafter, plaintiff was unable to procure the return of her stock and sued for conversion. The Special Commissioner in Bankruptcy reported that the debt was dischargeable in bankruptcy, that it was not a case of wrongful and malicious injury to property. The report was confirmed by Judge Holt in the District Court.

In re Ennis & Stoppani, 171 Fed. Rep., 755: This was a motion in the United States District Court, Southern District of New York, to vacate a stay which was obtained against the entry of a judgment in an action brought against the bankrupts Ennis & Stoppani in the Supreme Court of the State of New York. The action was for the conversion of stock which had been purchased by the bankrupts for the petitioner. The allegations of conversion were:

> "The defendants converted said stocks to their own use and benefit in the fraud of the rights of the plaintiff. By reason of the said illegal and fraudulent sale of said shares of stock by the defendants herein, as aforesaid, and by reason of the illegal and fraudulent acts of the defendants hereinabove set forth, the plaintiff has suffered damages."

The Court refused to vacate the stay, holding that the debt would be barred by a discharge in bankruptcy of the bankrupts. Judge Hand, in his opinion, said:

> "Prior to 1903 his case would have come squarely within the rule of Crawford *v.* Burke, 195 U. S., 176; 25 Sup. Ct., 9; 49 L. Ed., 147; Tindle *v.* Burkett, 205 U. S., 183; 27 Sup. Ct.,

493; 51 L. Ed., 762, and the question is whether the amendment of 1903 changed the law as there laid down * * * (page 757). The only injury to his property rights considered is its conversion, and if that be a malicious injury to his property, so is every fraud or embezzlement, and the earlier part of Subdivision 2, as well as the whole of Subdivision 4, is merely elaborate tautology. This cannot be the correct meaning of the words. Injury to person and property means causing damage to the subject matter of the rights, not depriving the owner of them. It is so used generally in the law, and Tinker *v.* Colwell, 193 U. S., 473; 24 Sup. Ct., 505; 48 L. Ed., 754, is no exception to the rule, because the theory was, not that the husband is deprived of his rights in his wife, but that her seduction is an actual assault upon her person. * * * Be that as it may, I cannot interpret those words in a way so entirely at variance with their traditional meaning as to cover willful conversion merely because I am uncertain whether they really cover any other cases than they did prior to 1903. Besides, the facts *In re* Adler, 152 Fed., 422; 81 C. C. A., 564, although not the reasoning, make that case an authority to the contrary; because, though the money there appropriated by the factor may have been the principal's only in equity, it would be an unreasonable distinction to say that there was an injury to property only when the wrongdoer converted that to which the victim had legal title. Kavanaugh *v.* McIntyre, 128 App. Div., 722; 112 N. Y. Supp., 987, undoubtedly bears out the petitioner here, there being no valid distinction between that case and this; but it is not an authority binding upon me, and I regret that I cannot assent to its reasoning. Moreover, it is contradicted by Maxwell *v.* Martin, 130 App. Div., 80; 114 N. Y. Supp., 349, in the First Department, a court of equal authority. I cannot, therefore, agree that the case comes within either of the clauses of the second subdivision."

This was the view adopted in Collier on Bankruptcy, 4th Edition, page 222.

V.

The plaintiff-in-error being innocent of any wrongdoing to the defendant-in-error cannot be liable for a wilful and malicious injury to property, within the meaning of (2), Section 17a of the United States Bankruptcy Law of 1898 as amended.

The plaintiff-in-error, John G. McIntyre, was innocent of any wrongdoing in the sale or disposition of plaintiff's stock. There is no evidence of any kind connecting him with the conversion. He testified (Record, p. 37) that he was the Board member of the firm and his occupation was on the floor of the Exchange. That he had no duties to perform in the office. That he did not know the plaintiff before the commencement of the suit. Did not know that McIntyre & Co. had received any stocks from A. O. Brown & Co. That he had authorized no one to sell, pledge or dispose of any of the stocks; and had no knowledge that said stock was being sold or disposed of. He had no knowledge that he received any part of the proceeds of said stock.

If we adopt the definition of a wilful and malicious injury laid down by this Court in Tinker *v.* Colwell, 193 U. S., 473, as a "willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in or of itself, and which necessarily causes injury and is done intentionally," it cannot be said that there is any proof of any such act on the part of the plaintiff-

in-error. It is true that a partner is liable civilly for the wronful acts of his partner committed within the scope of the firm business (Strang *v.* Bradner, 114 U. S., 555; Matter of Peck, 206 N. Y., 66; Castle *v.* Bullard, 64 U. S., 172). But is this civil liability for an imputed wrong of the offending partner one which the Bankrutcy Act intends to exclude from the benefits of a discharge in bankruptcy? Does it not mean a liability for the wilful and intentional wrong of the bankrupt himself? Not his liability for the acts of others, but his own act against good morals, and his own disregard of what he knows to be his duty, his intentional act. When a penalty or punishment attaches to the doing of an act intentionally, can there be such a thing as an imputed intent? For instance, by Section 14 of the Bankruptcy Act of 1898, a certificate of discharge is denied to a bankrupt if he has "with intent to conceal his financial condition destroyed, concealed or failed to keep books of account;" it has been held that a falsifying of the books of a firm by one of the partners is not an objection to a discharge of the other partner who is innocent thereof (*In re* Schultz, Jr., 109 Fed. Rep., 264).

CONCLUSION.

For these reasons it is submitted the judgment of the State Court should be reversed as to the plaintiff-in-error.

Dated April 21, 1916.

ROBERT H. PATTON,
Counsel for Plaintiff-in-Error.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 88

JOHN G. McINTYRE,
Plaintiff-in-Error,

vs.

FREDERICK W. KAVANAUGH,
Defendant-in-Error.

In Error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

MYER NUSSBAUM,
Attorney for Defendant-in-Error.

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LIST OF CASES.

Supreme Court of the United States

OCTOBER TERM, 1915.

JOHN G. McINTYRE,
Plaintiff-in-Error,

against

FREDERICK W. KAVANAUGH,
Defendant-in-Error.

No. 408.

In error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

Statement.

Counsel for defendant-in-error begs leave to submit his statement of facts as that of plaintiff-in-error includes matters not embraced in the pleadings herein.

This action was commenced on or about May 18th, 1908, against the above named plaintiff-in-error, Thomas A. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., and one George C. Ryan, doing business as co-partners, under the firm name of T. A. McIntyre & Company, for the wilful con-

version of certain stocks owned by defendant-in-error (Transcript of Record, pages 2, 4, fols. 14 17). The cause of action sounding in tort, an order of arrest was obtained at the time of the service of the summons against Thomas A. McIntyre and plaintiff-in-error John G. McIntyre, whereupon bail was furnished by them after their arrest as aforesaid.

The said Thomas A. McIntyre, the plaintiff-in-error, John G. McIntyre, Edward T. White, Thomas A. McIntyre, Jr., together with said George C. Ryan, constituted, at the time of the commencement of this action, a co-partnership doing business under the firm name of T. A. McIntyre & Co., against whom an involuntary petition in bankruptcy had already been filed in the District Court of the United States, for the Southern District of New York, and who were adjudicated bankrupts subsequent to the commencement of this action, and on or about May 22nd, 1908.

Thereafter, pending the question of their discharge in bankruptcy, all of the parties, including plaintiff-in-error, obtained from said Bankruptcy Court orders of exemption staying the defendant-in-error from the prosecution of this action.

On or about June 6th, 1908, Thomas A. McIntyre (since deceased) and John G. McIntyre, plaintiff-in-error moved to vacate the orders of arrest obtained against them. Subsequently and on the 8th day of July, 1908, an order was duly made by Mr. Justice Howard denying said application to vacate said order of arrest. An appeal was taken from said order to the Appellate Division of the Supreme Court, Third Department of the State of New York, who, by an order dated the 27th day of November, 1908, unanimously affirmed the or-

der of the Court below, denying said motion to vacate said order. The opinion of the Court was rendered by Cochrane, J., reported in 128 New York Appellate Division, 728, and is set forth in full on page 5, of this brief. No appeal was taken from said order of affirmance of the Appellate Division aforesaid.

Subsequently John G. McIntyre, the plaintiff-in-error said, Edward T. White, Thomas A. McIntyre, Jr., and George C. Ryan applied for a discharge in bankruptcy, and that such proceedings were thereupon had, and that said plaintiff-in-error, John G. McIntyre, and said Edward T. White and Thomas A. McIntyre, Jr., were discharged in said Bankruptcy Court, and that a discharge as to said George C. Ryan was withheld and denied to him. By reason of the denial to said George C. Ryan of a discharge in bankruptcy, the same question of law that would arise as against the other parties, including the plaintiff-in-error, would not involve him, and so defendant-in-error procured an order on or about the 7th day of September, 1911, severing the action as to said George C. Ryan.

No opposition was made by the defendant-in-error herein to their discharge in bankruptcy upon the theory that the debt involved herein is an undischargeable debt by virtue of Sec. 17, Subdivision 2 of the Bankruptcy Act (amended 1903), and that the facts involved in said debt constitute larceny of the property of defendant-in-error.

That the defendant-in-error since the discharge in bankruptcy of said plaintiff-in-error John G. McIntyre, said Edward T. White and Thomas A. McIntyre, Jr., served his amended complaint to which said plaintiff-in-error and said other

parties served their amended answers. (Transcript of Record, fols. 14-38.)

The case was reached for trial on the 6th day of November, 1911, before Mr. Justice Joseph A. Kellogg, without a jury, at a Trial Term of the Supreme Court, at Ballston Spa, New York, and resulted in findings for the defendant-in-error. A judgment was thereupon entered on the 18th day of December, 1911, for the sum of thirty thousand four hundred and eighty 18/100 dollars. The opinion of Mr. Justice Kellogg is to be found in 74 New York Miscellaneous Reports, page 222 and at folios 108-116, of the transcript of record herein.

The plaintiff-in-error John G. McIntyre, and said Edward T. White and Thomas A. McIntyre, Jr., filed their exceptions and served a notice of appeal from said judgment to the Appellate Division of the Supreme Court, Third Department of the State of New York.

The Appellate Division by an order dated the 5th day of March, 1912, unanimously affirmed the said judgment from which judgment of said Appellate Division an appeal was taken to the Court of Appeals of the State of New York, which latter Court (reported 210 New York Reports, page 175) affirmed unanimously the decisions of the Courts below (the opinion of said Court of Appeals appears in full at folio 160 of the Transcript of Record herein) and from the decision and judgment of said Court of Appeals, John G. McIntyre, plaintiff-in-error (the other parties to the action not joining therein), after notice of the application for the writ, obtained and filed a writ of error to this Court. The writ of error was allowed by the Hon. Charles E. Hughes, Associate Justice of the United States Supreme Court on March 5, 1915. Record, folio 153.

POINT I.

The findings of the courts upon the facts and law come clearly within the purview and meaning of subdivision 2, Section 17 of the Bankrupt Law, as amended in 1903.

The very able and exhaustive opinion of Mr. Justice Cochrane, reported 128 New York, Appellate Division, page 722, on the appeal from the order denying the motion to vacate, the order of arrest granted here, clearly demonstrates that a discharge in bankruptcy cannot avail the plaintiff-in-error as to the debt involved herein and follows in full:

COCHRANE, J.:

The complaint alleges the co-partnership of the defendants; that on February 5, 1908, plaintiff was the owner of certain specified stocks, the certificates of which were in the possession of the firm of A. O. Brown & Co.; that there was due upon such stocks the sum of $3,853.32, and that the plaintiff on the day mentioned was entitled to the possession of said stocks on payment of said amount; that on said day the plaintiff instructed the defendants to take over said stocks from said firm of A. O. Brown & Co., and to advance thereon said sum of $3,853.32 and that such stocks were turned over and delivered by A. O. Brown & Co. to the defendants as such co-partners, the latter advancing thereon said sum of $3,853.32. The complaint then alleges that subsequent to the sale and disposition of said stocks by said defendants as there-

after alleged, and on or about the 27th day of April, 1908, an involuntary petition in bankruptcy was filed against the defendants as such co-partners in the District Court of the United States for the southern district of New York and that receivers of said firm were subsequently appointed and duly qualified; that on April 28, 1908, the plaintiff tendered to said receivers the balance due and interest upon said stocks and demanded delivery of the same which was refused; that subsequent to said 5th day of February, 1908, the said defendants as such co-partners wrongfully converted and disposed of said stocks and the avails thereof to their own use to the damage of plaintiff in the sum of $30,000, for which sum judgment is demanded.

On this complaint and on an affidavit setting forth more in detail the facts of the alleged conversion plaintiff procured an order of arrest directing the sheriff of New York county to arrest the defendants and to hold each of them to bail in the sum of $5,000. This order has been executed and the appellant having given the bail thereby required moved to vacate the order of arrest and from an order denying such motion this appeal is taken.

The complaint is assailed for insufficiency on the ground that there is no allegation of a demand on the defendants for a return of the property which lawfully came into their possession. From the entire complaint it appears that after the defendants procured possession of the stocks, and before the petition in bankruptcy was filed against them, they sold and disposed of the stocks and devoted the avails thereof to their own uses. When a person, although lawfully in possession of property, unlawfully disposes of the same, and puts it

out of his power to make return thereof, a demand for such return would be a useless performance, and the law requires neither the allegation nor proof of such demand. This complaint alleges an unlawful sale and disposition of the property, and it is such unlawful act which constitutes the conversion. While the circumstances of the sale and disposal of the stocks are not alleged, and the complaint in that particular may be vague and indefinite, yet I entertain no doubt as to its sufficiency as against a demurrer were one interposed. The appeal, therefore, cannot be sustained on the ground that the complaint will be dismissed.

A more difficult question arises concerning the effect of the Bankruptcy Act on the cause of action alleged. The provisions of that act applicable to the present situation are as follows: "Sec. 9. Protection and Detention of Bankrupts.—a A bankrupt shall be exempt from arrest upon civil process except in the following cases: * * * (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release. * * *."

"Sec. 17. Debts not Affected by a Discharge.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

"Sec. 63. Debts which may be Proved—a Debts of the bankrupt may be proved and allowed against

his estate which are * * * (4) founded upon an open account, or upon a contract express or implied; * * *"

The case of *Crawford* vs. *Burke* (195 U. S., 176), was a case arising in the State of Illinois to recover for the conversion of stocks which the defendants had in their possession as security for the amount due them from plaintiff and which they had wrongfully and fraudulently sold and converted to their own use. It was held by the Supreme Court of the United States reversing the State court of Illinois that plaintiff might have waived the tort and proved his claim in the bankruptcy court and that the claim was one "founded upon an open account or upon a contract express or implied" within the meaning of said section 63 and was, therefore, a provable debt within the meaning of said section 17. It was further held that it did not fall within the exception contained in subdivision 4 of said section 17 and that a discharge in bankruptcy would relieve the bankrupt from such claim. That case is analogous to this and would be conclusive in favor of appellant, except for the amendment of the statute to which reference will now be made. (See, also, *Tindle* vs. *Birkett*, 183 N. Y., 267.)

Prior to 1903, subdivision 2 of section 17 was as follows: "(2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another." It was in reference to the statute in that form that the cases of *Crawford* vs. *Burke* and *Tindle* vs. *Birkett* (*supra*), were decided, and as the claims under consideration in those cases had not been reduced to judgments, no question could arise that

such claims were covered by the phraseology of the statute, as it was before 1903. But in the latter year, subdivision 2 of section 17 was entirely changed in its scope and purport and made to read as follows: "(2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation." The question here presented is whether plaintiff's claim is one for a "willful and malicious [injury] to the * * * property" of himself.

That such claim is still a provable debt must be conceded under the authority of *Crawford* vs. *Burke*. But although provable, it is not immune as against a discharge in bankruptcy, provided it falls within one of the exceptions enumerated in subdivision 2 of section 17. In order to constitute such an exception, the claim must constitute both a willful and malicious injury to plaintiff's property.

It is doubtless true that in the popular and ordinary sense the term "malice" implies the idea of hatred, spite, or ill will, but in legal parlance the term is frequently used in a different sense. There have been many and various definitions or descriptions of the term "malice" depending on the connection in which the word is used, the object sought to be obtained, and the consequences dependent on its use.

In Words and Phrases Judicially Defined (Vol. 5, page 4298), it is said: "'Malice,' in common acceptation, means ill will against a person; but in its legal sense it means a wrongful act done in-

tentionally, without just cause or excuse." And, again, "The term 'malice' is variously used according to the nature of the litigation in which it is sought to be established. In legal parlance, malice may be actually implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse. In civil controversies, the very essence of malice is a disposition or willingness to do a wrongful act greatly injurious to another."

In Cyc. (Vol. 25, pages 1666, 1667), the authorities are collated bearing on the definition or description of this word, and it is said: "In its legal sense, however, the term has been said to denote a wrongful act done intentionally without just cause or excuse; and this definition has been substantially adopted in a great many cases with immaterial alteration of phraseology, as follows: The intentional doing of a wrongful act toward another without legal justification or excuse; the willful doing of an injurious act without lawful excuse; the doing a wrongful act intentionally without just cause or excuse."

The Century Dictionary, in defining the word, says: "In law a design or intention of doing mischief to another; the evil intention (either actual or implied) with which one deliberately and without justification or excuse does a wrongful act which is injurious to others. * * * Constructive malice, implied malice, imputed malice, malice in law, that which, irrespective of actual intent to injure, is attributed by the law to an injurious act intentionally done, without proper motive as distinguished from actual malice, either proved or presumed."

In Collier on Bankruptcy (6th ed., page 225), it is said of the statute under consideration: "The word 'willful' as here used means nothing more than intentional, while the malice here intended is nothing more than that disregard of duty which is involved in the intentional doing of a willful act to the injury of another."

In *Davis* vs. *Standard National Bank* (50 App. Div., 210, 213), it is said: "But while, to establish malice for certain purposes, such a willful intent is necessary, that intent is not involved in the legal definition of the term 'malice.' Whenever the wrongful act is done intentionally, without just cause or excuse, a legal inference of malice arises therefrom. (*Bromage* vs. *Prosser*, 4 B. & C., 247, 255; *Commonwealth* vs. *Snelling*, 15 Pick., 321, 340.)"

In *Commonwealth* vs. *York* (50 Mass. [9 Met.], 104), it is said: "Malice, although in its popular sense it means hatred, ill will or hostility to another, yet, in its legal sense, has a very different meaning, and characterizes all acts done with an evil disposition, a wrong and unlawful motive or purpose; the willful doing of an injurious act without lawful excuse."

Authorities might be multiplied to show that it is not essential in all cases that ill will should exist in order to establish malice. But we have an interpretation by the United States Supreme Court of the identical words under consideration. In *Tinker* vs. *Colwell* (193 U. S., 473), Mr. Justice Peckham, in considering the meaning of these words in the statute as it was prior to the amendment of 1903, said: "In *United States* vs. *Reed*, 86 Fed. Rep., 308, it was held that malice consisted in the willful doing of an act which the person

doing it knows is liable to injure another, regardless of the consequences, and a malignant spirit or a specific intention to hurt a particular person is not an essential element. Upon that principle we think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception. It is urged that the malice referred to in the exception is malice towards the individual personally such as is meant for instance in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. *Commonwealth* vs. *Williams*, 110 Massachusetts, 401. We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor and not a malicious wrongdoer that was to be discharged."

There are doubtless many torts against which a discharge in bankruptcy is effective. The act is liberally construed in favor of an honest and well-meaning debtor. A conversion of property may exist entirely consistent with the utmost good faith on the part of the converting debtor. In respect to such torts there is no injustice or inequity in extending the provisions of the Bankruptcy Act applicable thereto in accordance with the beneficent and humane policy of such act. But a conversion which shows a design or willingness to inflict a wrong upon another or the reckless dis-

regard of the rights of another, rests on a different basis. In *Matter of Bullis* (68 App. Div., 517), cited with approval in *Crawford* vs. *Burke* (*supra*), it is said: "The statute is to be construed liberally to discharge the insolvent from the burden of the obligations which he is unable to pay in full, but that liberality may not be extended to an insolvent to release him from a judgment which was recovered against him by reason of his 'positive fraud' and 'intentional wrong,' whatever may have been the form of the action in which the recovery was had. The primary purpose of the statute is to enable an insolvent debtor to be relieved from the burden of his obligations. One exception that has pervaded all of our bankrupt laws is that where the insolvent has become liable for the payment of a debt which had its origin in his own positive dishonesty, the way is not open for his discharge from that liability."

While the complaint herein does not show the circumstances of the alleged conversion, and, therefore, the willful or malicious character of the defendants' acts cannot be determined therefrom, yet the affidavit used on the motion supplements those allegations and shows that almost immediately after the defendants came into possession of this property they began to sell it to different parties and continued to make such sales from time to time without plaintiff's knowledge after they had realized more than sufficient to pay the amount due them from plaintiff and applied the avails to their own purposes. Resort may be had to the entire record to determine the character of the wrongful acts. (*Matter of Bullis*, 68 App. Div., 518; *Colwell* vs. *Tinker*, 169 N. Y., 531, 537; *Palmer* vs. *Hussey*, 87 id., 303.) No explanation

or justification of the alleged wrongful acts is proffered. The defendants in utter disregard of the rights of plaintiff, knowing they were injuring him and willing to do so in order to subserve their own wrongful purposes, converted his property. In short, the acts disclosed constituted larceny. There is neither reason nor justice in extending to such acts the protection of the Bankruptcy Act, unless we are clearly required to do so by its provisions. One of the purposes which Congress probably had in view in making the amendment of 1903 referred to, was to except from the benefits of the act just such conduct as is here disclosed on the part of the defendants.

Appellant cites with much confidence the case of *Matter of Floyd, Crawford & Co.* (15 Am. Bank Rep., 277). That case is essentially different on the facts. There was no moral turpitude involved, or intent to inflict wrong on another. The case recognizes the distinction, and by implication, lends support to plaintiff's position here. The commissioner in his report, said: "There is no moral turpitude or intentional wrong disclosed here, by the evidence, as for instance, embezzlement or misappropriation, which must exist to bring the 'liability' within the exception of debts which are released by a discharge in bankruptcy. Implied fraud or fraud in law, which may exist without the implication of bad faith or immorality, is not sufficient. * * * To recapitulate, the evidence having failed to disclose * * * any willful and malicious injury to the plaintiff or her property, * * * I conclude that this debt is not a liability embraced within the aforesaid exceptions."

While the question is novel and not free from doubt, I am of the opinion that for the reasons

heretofore stated the order so far as appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order so far as appealed from affirmed, with ten dollars costs and disbursements.

The cases which have been cited by my learned adversary as bearing upon the interpretation of what is meant by wilful and malicious injury to property have been most completely and ably disposed of by said opinion of Mr. Justice Cochrane, supra, and by the opinion of Mr. Justice Kellogg, Transcript of Record, folios 108-116, supra, and by the unanimous opinion of the Court of Appeals of the State of New York, folio 160, Transcript of Record, supra, who, in discussing the definition of the term "malicious" as used in the statutes, have said that it is "*any wrongful act done intentionally without just cause or excuse.*"

The cases cited by my learned adversary will be found on investigation to be obiter only, and if not obiter to have no application whatever to the case at bar as they are based upon a narrow construction of the term. For example in re Ennis and Stoppani, 171 Federal Reporter, page 755, holds that a conversion is not an injury to property and that injury to person and property means causing damage to the subject matter of the rights not depriving the owner of them, Mr. Justice Kellogg says, supra, "this narrow construction of the term injury to property is not in harmony with the accepted definition Bouvier expressly defines as follows:

> "*Injury to personal property are the unlaw-*
> "*ful taking and detention thereof from the*

"owner; and other injuries or some damage af-
"fecting the same while in the claimant's pos-
"session, or that of a third person, or injuries
"to his reversionary interests (see Bouvier's "Law Dictionary, Rawle's Revision, Volume 1, "page 1044)."

"To hold that a person is not injured in his "property where some portion of it is actually "taken away from him but only when it is all "left in his possession reduced in value, does "not give effect to the accepted meaning of the "phrase in legal parlance."

"The definition of the Code of Civil Pro-"cedure of the State of New York (section "3343, subdivision 10) *'an injury to property' "is an actionable act whereby the estate of "another is lessened, other than a personal in-"jury, or the breach of a contract. Although "expressly applicable only to that particular "statuate, this interpretation of the meaning of "the term is in full accordance with the gener-"ally accepted understanding.*

"The narrow construction contended for, "which would permit the perpetration of such "a barefaced wrong as in the case at bar "without any civil liability surviving a dis-"charge in bankruptcy would be highly im-"proper and should not be struggled for, if "any other interpretation of the statute is "in any view permissible."

The meaning and legal interpretation to be given to the words "wilful and malicious" as used by Subdivision 2, Section 17 of the Bankruptcy Act as amended in 1903, we find, has been continuously resolved in favor of the defendant-in-error by all the

courts that have had occasion to pass upon the facts in this case. In the first instance by Mr. Justice Howard, upon the motion to vacate the order of arrest granted herein, then by the Appellate Division upon the appeal from the order denying the motion to vacate such order of arrest, supra. The latter Court holding that the acts and conduct of the plaintiff-in-error and his partners herein as set forth in the affidavits then before the Court, if proven upon the trial would clearly constitute the wilful and malicious injury to the property of another, especially reserved under the aforesaid amendment to the bankruptcy law of 1903, from the operation of a discharge. Subsequently the Trial Court at which Mr. Justice Kellogg presided, supra, found:

> *"These facts as set forth in the affidavits "upon which the order of arrest was sustained "by the Appellate Division were amply proven "upon the trial before this Court."*

An appeal taken from the judgment of the Trial Court to the Appellate Division was again unanimously affirmed as was also as before stated the appeal from the Appellate Division to the Court of Appeals of the State of New York.

We have the opinions of five different tribunals who have passed upon the facts in this case at its various stages determining unanimously that the acts of the plaintiff-in-error and his partners herein constitute "wilful and malicious injury to the property of another" as expressed and embodied in the aforesaid amendment to the Bankruptcy Act, and any attempt on the part of counsel to add to the very able and exhaustive opinions of Mr. Justice Cochrane and Mr. Justice Kellogg, *supra*, as and the Court of Appeals of the State of New York

to what constitutes wilful and malicious injury to property within the meaning of the law would be futile.

It is fair to say that it is the universally recognized rule that a wilful and malicious injury to the property of another means "a wrongful act done intentionally without just cause or excuse," and not as my learned adversary would have it that actual hatred, spite or ill will must be shown towards the person injured. Such being the judicially construed interpretation of the phrase "wilful and malicious," emphasis must be laid upon the holdings of the courts herein, that the facts in this case come squarely within the intent of the Bankruptcy Act as to those cases where a discharge would be fruitless and unavailing.

However much my adversary may struggle for an interpretation of said Subdivision 2 of Section 17, which would give the plaintiff-in-error a discharge in bankruptcy from this debt, and base his contention upon cases that have been heretofore cited wherein the facts are entirely different and are not in any sense as aggravated as they are in the case at bar, the fact remains that the Courts never intended to follow a general interpretation of the Bankrupt Law involving conversion which would permit the discharge of a bankrupt who has not only been guilty of conversion, but who has deliberately stolen the moneys derived from the sale of properties without right, and which, when analyzed, involves moral turpitude as well. As Judge Cochrane very properly says, supra:

> *"A conversion of property may exist entire-*
> *"ly consistent with the utmost good faith on*

"the part of the converting debtor. In respect "to such torts there is no injustice or inequity "in extending the provisions of the Bankruptcy "Act applicable thereto in accordance with the "beneficent and humane policy of such act. "But a conversion which shows a design or "willingness to inflict a wrong upon another "or the reckless disregard of the right of an- "other rests on a different basis."

A careful examination of the facts in each of such cases so cited by my adversary will show that such decisions are based upon ordinary conversion of property and do not embrace the other elements constituting moral turpitude so as to bring them clearly within the purview and meaning of said Subdivision 2 of Section 17, *and were decided prior to the aforesaid amendment to the Bankruptcy Law which changed the wording of the statute from "judgment" to "liabilities."* In *Tindle* vs. *Burkitt,* 183 N. Y., 267, when this Court apparently changed what had been the rule for years in actions of tort, and based its decision upon *Crawford vs. Burke,* reported in 195 U. S., page 175, which latter case is an action growing out of a marginal transaction in stocks, wherein the broker in such a case has certain rights with respect to borrowing moneys upon such stocks, and wherein the ownership is only nominal in the customer, it must be evident the Court did not intend to change the law so as to include an action of this character. That the Courts have recognized a wide distinction in the two classes of cases relating to stock transactions is again evidenced by the distinction which has been recognized by the Courts with reference to the rule of damages, that is, in the ordinary

cases of conversion where the transaction is a marginal one as before stated, the Courts have confined the plaintiff to the prices that obtain at the time of the alleged conversion, whereas, in cases similar to the one at bar, the plaintiff is not limited to that extent and may prove his damages according to the prices that obtain down to the time of the trial.

Markham vs. *Jaudon*, 41 N. Y., 235, 245
251, 252.
Romaine vs. *Van Allen*, 26 N. Y., 309.

Moreover, Crawford vs. Burke and Tindle vs. Burkitt, should not be followed as they were not based upon the amendment to the Bankrupt Law of 1903 *as before stated*

Of two things counsel is sure, one is that the Courts in deciding cases of this character, do not intend to lean towards a scoundrel who steals one's property, and the other is that the courts have not decided (as my adversary would have it understood) that all cases of conversion, without regard to the elements of crime that are involved in them are dischargeable in bankruptcy, for that would certainly spell out an anomaly as it could clearly be stated in the one breath that such a bankrupt could be indicted for stealing one's property, and in the next breath that the victim would be without civil liability surviving a discharge in bankruptcy. Surely, such a contradiction in remedies would seem to make the law farcical and meaningless.

POINT II.

Plaintiff-in-error is just as guilty of wrongdoing to the defendant-in-error as are the other partners of the firm of T. A. McIntyre & Company.

Mr. Justice Kellogg, supra, comments as follows upon the liability of all of the partners of T. A. McIntyre & Company:

> *"It is urged in behalf of the answering de-"fendants that they knew nothing about the "transaction; that it was consummated by "some other member of the firm. The pro-"ceeds, however, of the conversion went into "the firm's bank accounts and were used for "its benefit, and all of the co-partners there-"fore are liable for the act.* (*Chester* vs. "*Dickerson*, 54 N. Y., 1; *Griswold* vs. *Haven*, "25 N. Y., 595; *Matter* of *Pierson* 19 App. Div., "478; *Bradner* vs. *Strang*, 89 N. Y., 299, affd., "114 U. S., 555; *Castle* vs. *Bullard*, 64 U. S., "172; *Levy* vs. *Abramsohn*, 39 Misc., 781; *Co-"man* vs. *Recse*, 21 How. Pr., 114; *Sherman* vs. "*Smith*, 42 How Pr., 198)."
>
> *"However vigorously certain of the defend-"ants may deny knowledge of the transaction, "the act was performed by some member of "the firm for the common benefit of all, and "undoubtedly sustained for a time the credit "of the firm, and postponed for all the part-"ners the evil day of admitted insolvency with "the resultant opportunity for recoupment of "losses which unfortunately proved unavail-"ing. All the members of the co-partnership "are therefore civilly liable."*

The law upon this branch of the case appears to be so well settled that counsel for defendant-in-error will content himself by citing the more recent case entitled Matter of Peck reported in 206 N. Y., 56; wherein it is conclusively held that all partners in cases of this character without regard to knowledge or participation are equally liable.

CONCLUSION.

It is submitted the judgment of the State Court should be affirmed.

Dated, September 12, 1916.

MYER NUSSBAUM,
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51 Chambers Street,
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McINTYRE *v.* KAVANAUGH.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 88. Argued November 10, 1916.—Decided December 4, 1916.

Partners are individually responsible for torts committed by their firm while acting within the general scope of its business, whether they personally participate therein or not.

One who, being entrusted with the possession of corporate stocks as security for an indebtedness, deliberately sells them and appropriates the proceeds, in excess of the debt secured, without the knowledge or consent of their owner, is guilty of a "willful and malicious" injury to property within the meaning of § 17, clause 2, of the Bankruptcy Act, as amended by the Act of February 5, 1903, 32 Stat. 798, and, consequently, his liability is not released by a discharge in bankruptcy.

210 N. Y. 175, affirmed.

THE case is stated in the opinion.

Mr. Robert H. Patton for plaintiff in error.

Mr. Myer Nussbaum for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiff in error was a member of T. A. McIntyre and Company, engaged in business as brokers. During February, 1908, the partnership received certain stock certificates owned by defendant in error and undertook to hold them as security for his indebtedness amounting to less than one-sixth of their market value. Within a few weeks, without authority and without his knowledge, they sold the stocks and appropriated the avails to their

own use. Shortly thereafter both firm and its members were adjudged bankrupts. After his discharge in bankruptcy this suit was instituted against plaintiff in error seeking damages for the wrongful conversion. He set up his discharge and also personal ignorance of and non-participation in any tortious act.

The trial court held the liability was for wilful and malicious injury to property and expressly excluded from release by § 17 (2), Bankruptcy Act, as amended in 1903; and that the several partners were liable. A judgment for damages was affirmed by Appellate Division, 128 App. Div. 722, and Court of Appeals, 210 N. Y. 175.

That partners are individually responsible for torts by a firm when acting within the general scope of its business whether they personally participate therein or not we regard as entirely clear. *Castle* v. *Bullard*, 23 How. 172; *Matter of Peck*, 206 N. Y. 55. If under the circumstances here presented the firm inflicted a wilful and malicious injury to property, of course, plaintiff in error incurred liability for that character of wrong.

As originally enacted, § 17 of the Bankruptcy Act provided:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; . . . (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

This was amended by Act February 5, 1903, so as to read:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries

to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The trial court found—

That on February 5, 1908, McIntyre and Company by agreement obtained possession of Kavanaugh's stocks, worth approximately $25,000, and held them as security for his indebtedness amounting to $3,853.32.

"That almost immediately after taking over said stocks by certificates as aforesaid by said firm of T. A. McIntyre & Company, composed as aforesaid, and commencing on the very next day, said firm of T. A. McIntyre & Company (the above-named defendants being members thereof) without any notice to the plaintiff, and without his authority, knowledge or consent, or demand of any kind upon him, sold and disposed of the identical certificates of such stock and scrip so turned over to them as aforesaid, and placed the avails thereof in the bank account of said firm of T. A. McIntyre & Company to the credit of said firm.

"That the various stocks aforesaid had all been disposed of prior to the 18th day of March, 1908, and that three-quarters in value thereof had been disposed of on or prior to February 14th, 1908, or within nine days after the acquisition of the possession thereof by defendant's firm as aforesaid.

"That the above named defendants, together with the other members of said firm of T. A. McIntyre & Company, in disposing of said stocks aforesaid, without notice to, or demand upon the plaintiff, and without his authority, knowledge or consent, and in depositing the proceeds and avails thereof in the bank account to the credit of said firm of T. A. McIntyre & Company, committed wilful and malicious injury to the property of the plaintiff.

"That on April 23rd, 1908, the said firm of T. A. McIntyre & Company filed a petition in bankruptcy in the United States District Court for the Southern District of New York, and were afterwards adjudicated bankrupts.

"That thereafter the plaintiff in this action proved his claim against the bankrupt estate without waiving any legal rights in this action or otherwise."

To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptation of the words. Bouvier's Law Dictionary—Injury. And this we understand is not controverted; but the argument is that an examination of our several Bankruptcy Acts and consideration of purpose and history of the 1903 amendment will show Congress never intended the words in question to include conversion. We can find no sufficient reason for such a narrow construction. And instead of subserving the fundamental purposes of the statute it would rather tend to bring about unfortunate if not irrational results. Why, for example, should a bankrupt who had stolen a watch escape payment of damages but remain obligated for one maliciously broken? To exclude from discharge the liability arising from such transactions as those involved in *Crawford* v. *Burke*, 195 U. S. 176, and here presented, not improbably was a special purpose of the amendment.

In *Tinker* v. *Colwell*, 193 U. S. 473, 485, 487, we said of original § 17 (2), "In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained." And further, "A willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to

come within the exception. It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where more intentional injury without special malice towards the individual has been held by some courts not to be sufficient. *Commonwealth* v. *Williams*, 110 Massachusetts, 401. We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor and not a malicious wrongdoer that was to be discharged."

The circumstances disclosed suffice to show a wilful and malicious injury to property for which plaintiff in error became and remains liable to respond in damages. The judgment below is

Affirmed.